Supreme Court U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SUSAN OYGARD and NORVALD OYGARD,
Petitioners,

v.

TOWN OF COVENTRY, COVENTRY TOWN COUNCIL,
JOAN LEWIS, JOHN ELSESSER,
RICHARD ASHLEY, ALAN KOEPKE

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Susan Oygard, *pro se*
Norvald Oygard, *pro se*
235 North School Road
P.O. Box 62
Coventry, CT 06238
860-742-5209

18899

Questions Presented for Review

1. Did the defendants deny the petitioners due process of law under Conn. Gen. Stats. § 8-7 and § 8-8 in violation of the Fourteenth Amendment?

2. Did the defendants deny the petitioners equal protection of the law in violation of the Fourteenth Amendment?

3. Did the courts below correctly conclude that petitioners lack standing to raise a RICO claim?

4. Did the courts below correctly render judgment on municipal defendants' counterclaim against petitioners?

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OPINIONS BELOW

The unreported opinion *Oygard v. Town of Coventry et. al.*, No. 95 Civ.2486 (D.Conn. Mar.23, 1998) is found in the Appendix hereto on page 1. The Judgment of the District Court, *Oygard v. Town of Coventry et.al.*, No. 95 Civ. 2486 (D.Conn. Mar. 24, 1998) is found in the Appendix on page 15. The Summary Order of the Court of Appeals for the Second Circuit, *Oygard v. Town of Coventry et. al.*, No. 98-7578 (Dec.1, 1998) is found in the Appendix on page17.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on Dec. 1, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV

Section 1. ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person, who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subject, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Connecticut General Statutes § 8-7

The concurring vote of four members of the zoning board of appeals shall be necessary to reverse any order, requirement or decision of the official charged with the enforcement of the zoning regulations ... An appeal may be taken to the zoning board of appeals by any person aggrieved..... An appeal shall not stay any such order, requirement or decision which prohibits further construction or expansion of a use .... An appeal from any other order, requirement or decision shall stay all proceedings in the action appealed from..

Connecticut General Statutes § 8-8

(f) Service of process shall also be made on each person who petitioned the board in the proceeding, provided his legal rights, duties or privileges were determined therein.

(g) The appeal shall state the reasons on which it has been predicated and shall not stay proceedings on the decision appealed from. However, the court to which the appeal is returnable may grant a restraining order, on application, and after notice to the board and cause shown.

(o) There shall be no right to further review except to the Appellate Court by certification for review, on the vote of two judges of the Appellate Court so to certify and under such other rules as the judges of the Appellate Court establish. The procedure on appeal to the Appellate Court shall, except as otherwise provided herein, be in accordance with the procedures provided by rule or law for the appeal of judgments rendered by the Superior Court unless modified by rule of the judges of the Appellate Court.

Connecticut Rules of Appellate Procedure § 4046

In all actions, except where otherwise provided by

statute or other law, proceedings to enforce or carry out the judgment shall be automatically stayed until the time to take an appeal has expired; if an appeal is filed, such proceedings shall be stayed until the final determination of the cause .....; ... if the judge who tried the case is of the opinion that .... due administration of justice so requires that judge may at any time, upon motion and hearing, order that the stay be terminated.

18 U.S.C. § 1964

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, ...

18 U.S.C. § 1962

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity ... to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, ... or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

18 U.S.C. § 1961

(1) "racketeering activity" means (A) any act or threat involving .. bribery, .. which is chargeable under State law and punishable by imprisonment for more than one year;

Connecticut Penal Code § 53a-147 Bribery:
Class D felony

(a) A person is guilty of bribery if he promises, offers, confers or agrees to confer upon a public servant, or person selected by be a public servant, any benefit as consideration for the recipient's decision, opinion, recommendation or vote as a public servant or person selected to be a public servant.

Connecticut Penal Code § 53a-148 Bribe receiving:
Class D felony

(a) A public servant or person selected to be a public servant is guilty of bribe receiving if he solicits, accepts or agrees to accept from another person any benefit for, because of, or as consideration for his decision, opinion, recommendation or vote.

Connecticut Penal Code § 53a-146 Definitions

(2) "Benefit" means monetary advantage, or anything regarded by the beneficiary as a monetary advantage, including benefit to any person or entity in whose welfare he is interested.

(3) "Public servant" is an officer or employee of government, elected or appointed, and any person participating as advisor, consultant or otherwise, paid or unpaid, in performing a governmental function.

STATEMENT OF THE CASE[1]

Defendant Alan Koepke ("Koepke") is a principal in the firm of Communications and Electronics which is in the business of selling and servicing two-way radio equipment to, *inter alia*, fire and police departments and state and local governments. As of 1995 Koepke owned or operated five commercial radio towers in eastern Connecticut.

Petitioners Norvald and Susan Oygard are owners of real property in a residential zone on North School Road in Coventry, Connecticut, which they purchased in 1978.

The Defendant Town of Coventry is situated about 18 miles east of Hartford, Connecticut, with a population of around 11, 000 and an annual budget of approximately $19 Million. The Coventry Town Council[2] has the authority to engage a Town Attorney and to hire the Town Manager[3] who is the chief executive officer, the chief financial officer, and the purchasing agent for the Town of Coventry.

In June 1986, Koepke sought a zoning permit to construct a commercial radio tower in a residential zone on North School Road across the street from the Oygards' property. At the time he sought his zoning permit Koepke offered free use of the tower to the Town of Coventry.[4]

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[1]For a more complete Statement of Facts, with references to documentary evidence see Plaintiffs' Motion for Summary Judgment, Appendix pgs. 45-72.

[2]Defendant Joan Lewis was Chairperson of the Coventry Town Council from Nov.1985 until Nov. 1991 and a member of the Town Council thereafter until Nov, 1993. Defendant Richard Ashley was Chairperson of the Town Council from Nov. 1991 until Nov. 1995.

[3]Defendant John Elsesser has been Coventry Town Manager since May 1988.

[4]Appendix pgs. 46-47

On August 7, 1986 Koepke obtained the zoning permit he sought, but, on August 12, 1986, before any construction commenced, and pursuant to Conn Gen. Stat. § 8-7, the Oygards filed an appeal to the Zoning Board of Appeals (ZBA) "challenging the validity of the ... permit on the grounds that its issuance adversely affected [their] property and that the radio tower was not permitted by the applicable zoning regulations." See Koepke v. Zoning Board of Appeals, 230 Conn. 452, 454, 645 A.2d 983 (1994) Koepke was notified of the Oygard appeal to the ZBA by telephone the day it was filed, and seven days later by certified letter.[5] A public hearing was scheduled for September 16, 1986.

Petitioners contend that, pursuant to Conn. Gen. Stat. § 8-7, their appeal challenging the validity of Koepke's zoning permit automatically stayed all proceedings related it's issuance, including construction and use, until they had the opportunity to be heard by the Zoning Board of Appeals.

On August 21, 1986, however, with the cooperation of the Coventry building inspector, Koepke proceeded with construction. Between September 11 and September 13, 1986 he erected the 160 foot steel tower on the site. On September 16, 1986 the Zoning Board of Appeals held a public hearing on the Oygard appeal and revoked the zoning permit that had been issued to Koepke on August 7.

On October 2, 1986, pursuant to Conn. Gen. Stat.§ 8-8, Koepke appealed the decision of the ZBA to the superior court naming petitioner Susan Oygard as a defendant pursuant to § 8-8(f). Pursuant to Conn. Gen. Stat. § 8-8(g) he also sought a restraining order to stay the decision of the ZBA[6]. No restraining order was granted.

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[5]Appendix pg. 48

[6]See Appeal dated October 2, 1986, pages 11-12 (Plaintiffs' Motion for Summary Judgment, Exhibit 1 Koepke

Failing to obtain court authority pursuant to § 8-8(g), Koepke nevertheless continued with construction and commenced operation. By 1987, certain town officials, (notably the building inspector), were secretly and illegally using the tower for free. When the Town Manager discovered the corruption within his own organization, he did not stop it.[7] (Appendix pgs. 50-51)

The ZBA could take no legal action against Koepke for defying its' decision because it had no independent

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Deposition exhibit 5):

"WHEREFORE, the plaintiff [Koepke] requests that this Court:

1. Sustain this appeal and reverse the decision of the decision of the Zoning Board of Appeals;

2. Restrain the defendant Board and town officials from interfering with completion of construction of the radio tower and its operation during the pendency of this appeal;"

[7]See Exhibit 12, Plaintiffs' Motion for Summary Judgment, Notes taken in 1987 by Town Manager's secretary Constance Anderson of her telephone conversation with Colin Rice, owner of the WILI radio tower in Lebanon, CT. : "4:00 Colin Rice - Has checked with his engineer. Our equipment - building official <u>was</u> on his [Rice's] tower for a few months. Rice could listen in on the conversations. The engineer says all of Koepke's "stuff" is on the tower on North School Rd. The frequency is in Coventry & it is "common knowledge" that he moved everyone to Coventry. This corresponds with Frank Trzaskos' [Coventry Chief of Police] understanding that Koepke had to rush to build the Coventry tower before the Mansfield tower came down. Lebanon was a filler until operations started in Coventry. Colin Rice says he will lease space to Coventry when we come off the North School Rd Tower."

authority derived from the Town Charter to engage an attorney to enforce its' decisions. The ZBA could only urge the Town Council to take action. In May 1987 the ZBA sent a letter to the Town Council "expressing the Board's deep concern over the problems of this tower being built without anyone's consent to do so."[8] The town attorney also wrote to the Town Council and the Town Manager to point out that "the town has several courses of action it can take to stop the operation [of the tower] ... One is to seek a zoning violation through the criminal court system and the other is to seek an injunction for violation of the stop work order."[9]

The Town Council, faced with prospect of giving up free use of Koepke's tower or enforcing the law, weighed in with Koepke. Off the record, town agencies were actively participating in and benefiting directly from Koepke's illegal activites and they would continue to do so.[10]

By giving the Town free service, Koepke had effectively neutralized the decision of the ZBA and undermined a judicial proceeding. (To see how the organization of local government enabled the defendants to thwart the legal process see Fig. 1, Appendix page 149).

Petitioners contend that the decision of the municipal defendants to accept free use of the tower and to protect Koepke from attempts by the ZBA and the zoning enforcement officer to enforce the zoning regulations, constituted violations of §53a-147 (Bribery) and §53a-148 (Bribe receiving) of the Connecticut Penal Code, which are

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[8]Plaintiffs' Motion for Summary Judgment Exhibit 7, Lewis Deposition p. 31,32, deposition exhibits 20, 21

[9]Ibid. deposition exhibit 19 Ltr. dated May 22, 1987

[10]The Town Council did not hesitate to enforce the zoning regulations against property owners who did not offer the Town any 'benefit'as defined by §53a-146 of the Connecticut Penal Code. See e.g., Appendix pg 106 fn 18

predicate acts under RICO. See Plaintiffs' Motion for Summary Judgment Memorandum of Law (Appendix pgs. 104-110)

In June and July of 1989, FCC radio station licenses showing transmitter locations at Koepke's tower at 200 North School Road were issued to the Coventry Police Department, the Coventry Local Government, and the South Coventry Fire Department, agencies under the direct supervision and control of the Town Manager.

On September 26, 1989 the trial court (Vasington,J.) rendered a decision in Koepke's favor in the administrative appeal of the ZBA decision that had been filed October 2, 1986 (Koepke v. Zoning Board of Appeals et. al.) holding that the ZBA lacked jurisdiction to hear the Oygard appeal because the legal notice was jurisdictionally defective and the Oygard appeal to the ZBA was untimely. On October 10, 1989 the Town Council voted not to appeal the trial court decision.[11] The judicial proceeding, however, was not over.

On October 16, 1989, the Oygards appealed the trial court decision to the Connecticut Appellate Court. Petitioners contend that pursuant to Conn. Gen. Stat § 8-8(o) and the Connecticut Rules of Appellate Procedure § 4046, they were entitled to a stay of all proceedings to enforce or carry out the judgment of the trial court until the final determination of the cause. The defendants, however, acting in concert, proceeded to violate § 8-8(o) just as they had violated § 8-8(g).

In November 1989, as yet unaware that the Town was using Koepke's tower, petitioners entered into a contractural agreement with the Town of Coventry as set forth in the Resolution appended to Plaintiffs' Complaint.[12] In

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[11]See Town Council meeting minutes dated Oct. 10, 1989 (Plaintiffs' Mot. for SJ Exhibit 33)

[12]Appendix pg. 43

exchange for a release from the Oygards, (signed Nov. 14, 1989) the Town agreed to pay $7,500 toward Oygards' outstanding legal bill and, if the Oygard appeal to the Appellate Court was successful, take appropriate legal action against Mr. Koepke to seek removal of the radio tower.(See Appendix pgs. 56-58) Unbeknownst to the Oygards, the Town had installed it's own utility meter on Koepke's tower on November 8, 1989 so that the Town could pay the electric bill for Town equipment directly.

On December 11, 1989 petitioners learned that the Town was using the tower. By letter dated Dec. 16, 1989 the town attorney advised the municipal defendants that no certificate of occupancy should be issued for Koepke's tower. (No certificate of occupancy ever was issued.) Nevertheless, with the protection of the entire executive power of the Town of Coventry, Koepke continued to violate the law with impunity and town agencies continued to use the tower for free. Municipal defendants never questioned the town attorney about the legality of using the tower.

On March 12, 1990 municipal defendants expressly informed petitioner Susan Oygard that they were using the tower and they had no intention of initiating legal action to seek removal of the tower regardless of the Appellate Court decision.[13] The actions of the municipal defendants at all times thereafter unequivocally manifested an intent to renege on ¶ 3 of the Resolution. In 1990 they purchased several thousand dollars worth of new radio equipment for use on Koepke's tower. The Town Manager signed the purchase orders.

From then on the collusion between the defendants was overt and blatent, - except to the courts. To the courts, the defendants maintained the deception that the Town of

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[13]See Municipal Defendants' undisputed material facts, Fact # 29 (See also Appendix pg. 146-148)

Coventry and its agents, officials, boards and commissions were prohibiting Koepke from completing and operating his communications tower, thereby causing him great harm.[14]

The appeal of the trial court decision took nearly five years, during which time municipal defendants continued to use the tower for free.[15] On November 1, 1993 Koepke signed a five year contract to lease antenna space on the North School Road tower to Connecticut Mobilecom. On March 22, 1994 Koepke told the Connecticut Supreme Court that he never "instituted any proceeding to enforce or carry out the judgment of the trial court as Oygard alleges."[16] In May 1994, the Coventry Police Department and the Local Government renewed their FCC radio station licenses to transmit from Koepke's tower.

In August 1994 the Connecticut Supreme Court rendered a final decision in Koepke v. Zoning Board of Appeals et.al. 230 Conn. 452, 645 A.2d 983 (1994), remanding the matter back to the ZBA for a properly noticed hearing. By August 1994 town agencies using Koepke's tower included the town manager's office, the police department, the highway department, the building department, the civil preparedness department, the zoning department, the fire departments, the parks and recreation department, and the dog warden. There were eight town transmitters on Koepke's tower. The value of free service given to the Town by Koepke was estimated by Koepke himself to worth $2,800 per month.[17]

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[14]The Town's insurance company was invited to pay for the alleged harm. See Koepke Deposition, Deposition exhibit 12 pg. 8 (Plaintiffs' Mot. for SJ, Exhibit 1)

[15] Koepke Deposition, p. 65 (Plaintiffs' Mot. for SJ, Ex.1)

[16]Appendix pg. 93

[17]Koepke responses to Interrogatories dtd. 7/10/96 (Plaintiffs' Mot. for SJ Exhibit 6)

The August 1994 decision of the Connecticut Supreme Court did not affect municipal defendants' conduct in the slightest. At no time, either before or after the Connecticut Supreme Court rendered a final decision, did municipal defendants ever seek legal advice about the propriety of using the tower.[18]

On April 18, 1995, The ZBA held a public hearing in compliance with the order of the Connecticut Supreme Court. On June 6, 1995, after thorough deliberations, the Zoning Board of Appeals unanimously sustained the Oygard appeal.

Municipal defendants immediately took action to block any attempt by the zoning enforcement officer to enforce the zoning regulations.[19] When, on June 19, 1995, Koepke again filed suit, pursuant to Conn. Gen. Stat. § 8-8, against petitioner Susan Oygard and the ZBA, the town attorney (now well aware that his client the Town was using the tower) filed an appearance on behalf of the ZBA, forclosing any possibility that the ZBA would take legal action to enforce it's decision.

Thereafter, as if the Oygards were invisible, municipal defendants continued to use the tower, refusing to renounce their involvement in Koepke's illegal activities, refusing to settle the matter out of court, - despite overtures by both the Oygards and Koepke, - and refusing to allow the ZBA to be represented by independent counsel.[20]

On October 16, 1995 petitioners commenced the instant action by filing a two count complaint in the Superior

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[18]Appendix pg. 94 footnote 5.

[19]Appendix pg. 71

[20]See Coventry Town Charter § 5-10 "Nothing herein shall be construed to prevent the hiring of other counsel by the town council when deemed necessary." Plaintiffs' Mot. for SJ, Exhibit 28

Court for the Judicial District of Tolland in Rockville, CT,[21] the first count invoking 42 U.S.C. § 1983 and the second count for tortious interference with contract. By notice of removal dated Nov. 17, 1996 the case was removed to the federal district court for the District of Connecticut.

On April 29, 1996 petitioners moved to amend their complaint to add a third count for breach of the covenant of good faith and fair dealing and a fouth count under 18 U.S.C. § 1964(c) RICO.

Thereafter the defendants decided to relocate the tower to the Coventry Town Hall. In August 1996 the tower was dismantled and removed. On September 30, 1996 the district court granted the motion to amend the complaint.[22]

Rule 12(b)(6) motions were filed by defendant Koepke and municipal defendants on November 4th, 1996 and November 12th, 1996 respectively, both of which were denied Jan. 30, 1997. Discovery closed Jan. 31, 1997. Defendant Koepke filed an answer Feb. 12, 1997. Municipal defendants filed an answer and counterclaim for breach of contract on Feb. 19, 1997. Petitioners filed a reply and raised four affirmative defenses to the Counterclaim.

Cross motions for summary judgment on all claims and counterclaims were submitted on March 31, 1997 and April 2, 1997. On March 23, 1998, the district court granted summary judgment in favor of defendants on all federal law claims and declined to exercise jurisdiction over the state

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[21]Petitioners' complaint, and all other documents filed in the district court, were filed by petitioners as *pro se*, non-lawyer, litigants. On May 18, 1997, while the cross motions for summary judgment were pending in the district court, petitioner Susan Oygard graduated from law school.

[22]See amended complaint, Appendix pg. 23.

law claims. The district court also entered summary judgment against petitioners on the counterclaim.[23]

Petitioners appealed to the Court of Appeals for the Second Circuit.[24] By Summary Order dated Dec. 1, 1998 the Court of Appeals upheld summary judgment against petitioners on the federal law claims, but found that the district court should have remanded the state law claims back to the state court. The Court of Appeals did not resolve the issues raised with respect to the counterclaim.

REASONS FOR ISSUING THE WRIT

1. The Court of Appeals for the Second Circuit has departed from the accepted and usual course of judicial proceedings or sanctioned such a departure as to call for an exercise of this Court's supervisory power.

The most striking departure from the accepted and usual course of judicial proceedings is the disposition of the counterclaim by the courts below.

On March 24, 1998 the district court entered the following judgment[25] against petitioners (plaintiffs):

> This action came before the Honorable Dominic. J. Squatrito, United States District Judge on cross-motions for summary judgment by the plaintiffs and the defendants as to the plaintiffs complaint and the municipal defendants' counterclaim. The court has reviewed all the papers filed in this matter and on March 23, 1998 entered its Ruling on Cross Motions for Summary

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[23]See Judgment, Appendix pg. 15

[24]See Appeal Brief Argument, Appendix pg. 117 et. seq.

[25]See Appendix page 15

> Judgment, granting the defendants' motion for summary judgment, denying the plaintiffs' motions for summary judgment, denying the defendants' motion to strike and denying the plaintiffs' motion to dismiss.
>
> There are no further pending claims to be considered and therefore, it is ORDERED, ADJUDGED and DECREED that summary judgment is entered in favor of the defendants and the case is closed.

In its Ruling[26] dated March 23, 1998, however, the district court omitted to mention the counterclaim. Petitioners argued on appeal, *inter alia*, that summary judgment without opinion, findings of fact or conclusions of law of any kind was improper,[27] citing Carter v. Stanton, 405 U.S. 669, 92 S.Ct.1232, 31 L.ed.2d 569 (1972) and U.S. v. Continental Oil, 377 U.S. 161, 84 S.Ct. 1155, 12 L.ed.2d 213 (1964).

The Court of Appeals addressed petitioners' argument in a footnote,[28] stating that it was unclear whether the district court actually had rendered summary judgment on the counterclaim.

With respect to the counterclaim, therefore, either the district court *did* enter summary judgment against petitioners without opinion, findings of fact, or conclusions of law of any kind, -- which judgment has not been vacated or reversed -- or the district court *did not* enter summary judgment, in which case the Court of Appeals did not even

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[26]Appendix page 1
[27]See Appeal Brief, Appendix page 143
[28]See Summary Order, Appendix page 21

have jurisdiction to act, because the court below had not disposed of all claims with respect to all parties.[29]

Such a foggy disposition of the counterclaim is a departure from the accepted and usual course of judicial proceedings.

The courts below also departed from the accepted and usual course of judicial proceedings by issuing a ruling addressed to an imaginary complaint. The district court stated "...[t]he property interest plaintiffs claim to have been deprived of is the right to proper enforcement of the town's zoning regulations with respect to an adjacent landowner's property."[30]

That is simply not true. Nowhere in plaintiffs' (petitioners') complaint (Appendix page 23) or motion for summary judgment (Appendix page 45) or anywhere else, do plaintiffs claim a property interest flowing directly from the Constitution to proper enforcement of the town's zoning regulations.

The property interest plaintiffs claim to have been deprived of is the right to use the adjudicatory procedures created by Conn. Gen. Stat. § 8-7. The right to appeal under Conn. Gen. Stat. § 8-7 is an individual entitlement grounded in state law and is therefore a 'property interest' protected by the Fourteenth Amendment. See Logan v. Zimmerman Brush Co 455 U.S. 422, 429 (1982): "... we see no meaningful distinction between the cause of action at issue in Mullane and Logan's right to use the FEPA's adjudicatory procedures."[31]

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[29]28 U.S.C. § 1291

[30]See Ruling, Appendix page 6

[31]During oral argument before the Court of Appeals, Nov. 17, 1998, petitioners called to the attention of the Court the holding in Logan v. Zimmerman Brush Co., *supra.*

Under C.G.S. § 8-7, aggrieved parties[32] are entitled, within a specified period of time (30 days), to challenge the decision of the zoning enforcement officer to issue a zoning permit to an abutting property owner.[33] Significantly, such an appeal automatically stays all proceedings in the action appealed from until the appellant has the opportunity to be heard by the zoning board of appeals.[34]

To the extent that the district court alluded to petitioners argument that C.G.S. § 8-7 created a property interest, the court stated "Not only did the plaintiffs take full advantage of their opportunity to be heard, but they

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[32]There is no question here that the Oygards are aggrieved parties within the meaning of the statute. "We conclude that ... there was no defect, subject matter or otherwise, in the board's authority to hear her [Oygard's] appeal." Koepke v. Zoning Board of Appeals, 230 Conn. 452, 456, 645 A.2d 983 (1994)

[33] As a general rule: "A permit issued as a result of a misrepresentation of material facts by a landowner or his agent can be revoked upon discovery of the misrepresentation. A similar result ensues in the case of a permit issued (1) as the result of a material mistake, or (2) as a result of fraud either on the part of the applicant, the building inspector, or both, or (3) in violation of the provisions of an ordinance." See Edward H. Ziegler, Jr. 4 Rathkopf's, The Law of Zoning and Planning, §49.02, pp. 49-9, 49-10.

[34]n.b. Although the statute gives the party challenging the validity of a permit (i.e., the appellant) the benefit of the automatic stay pending the outcome of the ZBA hearing, it also imposes a heavy burden of persuasion on the appellant. The concurring vote of four (out of five typically) members of the zoning board of appeals is necessary to revoke a permit. See Conn. Gen. Stat. § 8-7 pg. 1 above.

succeeded when they did so."[35] The court, however, never addressed the crux of petitioners' argument, i.e., that petitioners were denied the benefit of the automatic stay of proceedings while their appeal was pending before the board.

An automatic stay that attaches to a right to appeal is a substantive component of such a right, whether in the context of a life, liberty or property interest. It would be bizarre if a court were to hold that an appellant in a capital case, who was executed while his appeal was pending, was not denied due process because he had in fact taken advantage of his right to appeal and furthermore his appeal was eventually sustained on the merits.

Petitioners also claim a property interest secured by Conn. Gen. Stat. § 8-8 in the benefit of the board decision sustaining their appeal.[36] Koepke challenged the decision of the board in a judicial proceeding governed by Conn. Gen. Stat. § 8-8 - a judicial proceeding in which the Oygards were defendants[37] entitled to the protection of the Due Process Clause. This Court traditionally has held that "[t]he Due Process Clauses protect civil litigants who seek recourse in the courts, either as *defendants hoping to protect their property* or as plaintiffs attempting to redress grievances." (*emphasis added*) Logan v. Zimmerman Brush Co. *supra* p. 429

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[35]Ruling page 12, Appendix page 9

[36]See Conn. Gen. Stat. § 8-8(g) pg. 2 above.

[37]Not only were Oygards defendants, they were *indispensible parties* to Koepke's appeal of the ZBA decision. See discussion of Fong v. Zoning Board of Appeals of the Town of Greenwich 212 Conn. 628, 563 A.2d 293 (1989) in Plaintiffs' Appeal Brief, Appendix pages 122-123

The district court stated "due process is flexible and calls for such procedural protections as the particular situation demands" Ruling p. 12, Appendix page 9, but it never addressed what procedural protections the particular situation demands, i.e., it never addressed what process is due a defendant under Conn. Gen. Stats § 8-8. If bribing public officials to join a conspiracy to violate Conn. Gen. Stat. § 8-8 is the procedural due process equivalent of obtaining a restraining order under C.G.S. 8-8(g) or filing a motion to terminate the automatic stay under C.G.S. 8-8(o), then due process is flexible to the point of being meaningless.

The Court of Appeals understated the case in saying "The plaintiffs alleged that members of the Town Council, acting in concert with Alan Koepke, deliberately failed to enforce the town's zoning laws against Koepke."[38] In fact, the plaintiffs alleged that the municipal defendants and Koepke "conspired to violate .... C.G.S. 8-7 and 8-8, and the zoning regulations of the Town of Coventry". See Complaint ¶ 53, Appendix pgs. 32-33. Petitioners also alleged that the municipal defendants conducted the affairs of the Coventry Town Council through a pattern of racketeering activity (i.e., bribe receiving in violation of the Connecticut Penal Code §53a-148) when they accepted, on behalf of the Town, $2,800 per month in benefits derived from Koepke's illegal activities. See Complaint count four ¶ 59 (Appendix pgs. 40-41)

The courts below never addressed any of the statutes at issue. In its Discussion (Appendix pgs. 4-12) the district court does not even mention Conn. Gen. Stats. § 8-7 and § 8-8. The courts never addressed the elements of a civil or criminal conspiracy under Connecticut law. The courts

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[38]Summary Order page 2. Appendix page 19

never addressed the elements of bribery or bribe receiving under the Connecticut Penal Code §53a-147 and §53a-148.

Instead, the courts dismissed petitioners' civil rights claims by attributing to them an argument they never made, (i.e., that petitioners claim a property interest flowing directly from the Constitution to proper enforcement of the zoning regulations) while pretending not to notice the argument that petitioners actually did make.[39] (i.e., that Conn. Gen. Stats. § 8-7 and § 8-8 create property interests protected by the Fourteenth Amendment) That is a departure from the usual and accepted course of judicial proceedings.

2. The Court of Appeals for the Second Circuit has decided several important questions of federal law that have not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Municipal zoning regulations, - commonplace since 1926 when this Court upheld the constitutionality of zoning in Village of Euclid v. Ambler Realty Co. 272 U.S. 365 (1926), - generally prohibit or restrict certain land uses and structures in residential zones. City of Edmonds v. Oxford House, Inc. 514 U.S. 725, 731 (1995) Municipal zoning regulations in Connecticut are enacted within the framework of state zoning statutes,[40] including Conn. Gen. Stats. § 8-7 and § 8-8 which govern, *inter alia,* appeal procedures when it is alleged that an error has been made by a zoning official.

The decisions of the courts below provide a blueprint for violating local zoning regulations and state regulatory statutes governing zoning appeals with impunity:

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[39]See Appeal Brief pgs. 15-20, Appendix pgs. 119-131

[40]See Title 8, Connecticut General Statutes

To violate the zoning regulations with impunity, offer the Town a share of the proceeds from the prohibited activity. Taxpayers will gladly and uncritically accept free services.[41]

With the Town Council, the Town Manager, the Chief of Police, the building inspector and other town officials actively and knowingly participating in and accepting benefits derived directly from the prohibited activity, and with a Zoning Board of Appeals having no independent authority to engage an attorney to enforce its decisions or other legitimate interests, neighbors, like the Oygards, who presume to challenge the legality of your actions through the use of adjudicatory procedures created by state statute, can be ignored.

If the neighbors are few and far between, (like the Oygards who live in the woods on a dirt road), or if they lack the resources, it is unlikely they will be able to change the Town policy of bribe-receiving through political means. Nor will they find refuge in the courts because, according to the rule in the Second Circuit (a variation of DeShaney v. Winnebago County Department of Social Services 489 U.S. 189, 109 S.Ct. 998 (1989)), no one has the right to demand that public officials enforce the law against themselves.

If, after a ten year pattern of racketeering activity, the neighbor brings a civil RICO action against you, abandon the conspiracy, (or shift the locus of the conspiracy elsewhere), restore the value of the injured property and move to dismiss. You and your co-conspirators in the Town Hall can keep the proceeds from violating the zoning regulations.[42]

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[41]"Wherever there is an interest and power to do wrong," wrong will generally be done, .." James Madison 1788.

[42]Proceeds from violating local zoning regulations can be substantial, even greatly exceeding the value of any property injured by racketeering activity. In the Town of New

. . . .

Several important questions of federal law are raised by the decision of the Court of Appeals.

1) Does racketeering by public officials to circumvent the adjudicatory procedures governing zoning appeals shock the conscience of the court, and give rise to a substantive due process claim?

It is perhaps unusual for small town public officials to be held accountable under the same laws that the government brings to bear against John A. 'Junior' Gotti, for example,[43] but a clinical review of the facts of this case leads to the conclusion that all of the elements of racketeering are present, even though the actors do not fit popular stereotypes.[44]

Milford, Connecticut, for example, the landfill operator grossed $50 million in just three years from wilfully violating the New Milford zoning regulations. See Bauer v. Waste Management 239 Conn. 515, 686 A.2d 481 (1996)

[43]It was recently reported that federal prosecutors have added racketeering charges to an indictment of John A. 'Junior' Gotti for threatening violence to get a former manager of a topless club to drop a lawsuit. Petitioners point out that in their Complaint ¶ 55 (App. pg. 33) and in their Motion for Summary Judgment pg. 32 (App. pg. 67) they alleged that Koepke told petitioner Susan Oygard, that he would turn his property into a cemetary for the Oygards if he couldn't keep his tower there.

[44]The district court agreed that petitioners had stated a RICO claim when it denied defendants' Rule 12(b)(6) motions. Petitioners submitted uncontroverted evidence of all of the essential elements of a civil RICO action in their Motion for SJ. See App. pages 104-116. See also App. pg.

Such a conclusion follows *a fortiori* in light of the following following considerations:

First, the federal RICO statutes and the Connecticut bribery statutes, (unlike most criminal statutes), are to be broadly construed. See Sedima v. Imrex 473 U.S. 479,105 S.Ct.3275, 87 L.Ed.2d 346 (1985). "RICO is to be read broadly." Id. at 497. See also the 1971 Commission comment to Part XI of the Connecticut Penal Code 'BRIBERY, OFFENSES AGAINST THE ADMINISTRATION OF JUSTICE AND OTHER RELATED OFFENSES (Appendix pg.108): "These sections are purposely broad and general. Their purpose is to prohibit all forms of corruption of the governmental process."

Second, the burden of proof in a civil RICO action (at least in the Second Circuit) is 'preponderance of the evidence' not 'beyond a reasonable doubt' as in a criminal prosecution under RICO. Cullen v. Margiotta 811 F.2d 698, 731 (2d Cir. 1987).

Third, as this case was decided on summary judgment, all inferences must be drawn drawn in favor petitioners. "The court must view all inferences and ambiguities in a light most favorable to the nonmoving party." Bryant v. Maffucci, 923 F.2d 979, 982 (2d. Cir.), cert. denied, 502 U.S. 849 (1991)

During oral argument Nov. 17, 1998, petitioners urged the Court of Appeals to find that the predicate acts of bribery and bribe receiving by public officials to undermine the due administration of justice during the course of a ten year zoning appeal was a fundamental procedural irregularity giving rise to a substantive due process claim. The Court of Appeals did not agree. Both the Town of Coventry and

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75 Material Fact # 6 and App. pg 143, fn 82.

Koepke retain the proceeds[45] derived from a ten year pattern of racketeering activity. The decision of the Court of Appeals teaches that crime pays, particularly if public officials are involved.

Petitioners urge this Court to find that a pattern of bribe receiving, (or any of the other predicate acts under RICO), to obstruct justice during the course of an adjudicatory proceeding is a substantive due process violation. Racketeering *ought* to shock the conscience of the court, *more so* when those involved act under color of state law. As this Court noted in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) an agent acting under color of law possesses far greater capacity for harm than an individual exercising no authority but his own.

2. Is bribe-receiving by public officials a rational basis on which to deny the equal protection of the laws?

This Court stated in New Orleans v. Dukes, 427 U.S. 297 (1976) that the equal protection clause is satified so long as the classification is "rationally related to a legitimate state interest." Id. pg. 303 The district court recited the rule thus: "When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. " Ruling pg. 13 (Appendix pg. 10)

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[45]The Town alone retains the benefit of ten years worth of free services valued at $2800 per month. (See Exhibit 6 to Plaintiffs' Motion for Summary Judgment, Koepke responses to Interrogatories dated July 10, 1996, Interrogatory #4, "Based on eight (8) telecommunications transmitters in operation at the site ... the commercial rate would be $350/month per transmitter.")

The district court overlooked the significance of the limiting phrase 'When the basic classification is rationally based."

When the basic classification is not rationally based, it is of constitutional concern. A classification based on an irrational prejudice against the mentally retarded, for example, violates the equal protection clause. City of Cleburne v. Cleburne Living Center 473 U.S. 432 (1985)

Petitioners contend that a classification based on bribe-receiving also violates the equal protection clause. Bribe-receiving is a felony in Connecticut; it is not rationally related to a legitimate state interest. It is directly contrary to public policy as expressed by the legislature in the the Connecticut Penal Code §53a-148 and §53a-146.

In the case at bar, the conduct of municipal defendants in accepting $2800 per month in free services derived directly from Koepke's illegal activities was not only illegitimate, it was irrational.

Municipal defendants did not act out of any perceived necessity. When asked "Is it feasible for the Town to construct, on town property near the Town Hall, a radio communication tower that would serve the radio communications needs of the citizens of Coventry?", municipal defendants answered "yes"[46]. In fact, a municipality has several legal avenues to provide necessary public services, including radio communications services, to its citizens.

There was no mistake of law. Municipal defendants were advised several times by their own attorney, both in writing and at town council meetings, that Koepke's tower was illegal. The Town Council even passed a resolution

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[46]See responses to interrogatory #6, Exhibits 27, 46 and 13 to Plaintiffs' Motion for Summary Judgment.

drafted by the town attorney declaring it illegal.[47]

Incredibly, never once in nine years did municipal defendants ever question the town attorney about whether they should be using the tower.[48] The reckless indifference of municipal defendants to the legality of their own actions was surpassed only by that of Koepke himself, who began construction of the tower in violation of a statutorily imposed stay of proceedings, and proceeded to operate his tower for nine years with no valid zoning permit, no restraining order,[49] no certificate of zoning compliance,[50] no certificate of occupancy,[51] and two stop work orders in effect.[52]

It may be irrational and arbitrary, but it is easy to violate the law when the Town Council, the Town Manager, and the Chief of Police accept a share of the proceeds derived from the illegal activity, and there are only a few within the zone of interest sought to be protected by the law who are adversely affected.

Regarding the equal protection clause, it has been said :

> [n]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply

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[47]See Resolution appended to Plaintiffs' Complaint as Exhibit B (Appendix pg. 43): 'WHEREAS, the town of Coventry issued a zoning permit for the erection of a radio tower on property of Alan Koepke on North School Road, in violation of the Coventry Zoning Regulations....'

[48]See Appendix pg. 94, footnote 5

[49]Conn. Gen. Stat. § 8-8(g)

[50]Conn. Gen. Stat. § 8-3(f),

[51]Conn. Gen. Stat. § 29-265

[52]See Appendix pgs. 49, 51.

> legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected ...."

Railway Express Agency v. New York, Concurring opinion of Jackson, J. 336 U.S. 106,112 (1949)

The same can be said about allowing officials to pick and choose only a few to whom they will deny the protection of the law in return for a bribe.

3. Can a RICO defendant avoid liability by restoring the value of injured property after a plaintiff raises a RICO claim?

> "The only way to measure the injury done by an invasion of [a usufructary or intangible right inhering in land] is to ascertain the depreciation in market value of the physical property ..."

Dugan v. Rank, 372 U.S. 609, 624 (1963)

Petitioners presented evidence from a certified appraiser that the construction of Koepke's tower was the proximate cause of a devaluation in the market value of their property by $47,500.[53] The appraiser, who is licensed and certified in the State of Connecticut, visited the site, inspected and photographed the tower, walked petitioners' property, investigated the surrounding neighborhood, and examined the land records, surveys, aerial photographs, soil maps and topographic maps before assessing the damage at $47,500. There is no evidence in the record from any

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[53]See Appeal Brief pages 33-35 (Appendix pg. 137)

competent source to controvert the opinion of petitioners' appraiser.

Nevertheless, the courts below concluded that the injury was too speculative because the petitioners did not sell their property and the defendants moved the tower to the Coventry Town Hall after petitioners raised a RICO claim.[54] According to the courts below, the injury never occured because "the alleged loss in the value of the property would obtain only in the event the plaintiffs sold or attempted to sell the property" and, in addition, the injury was a "transient condition" and "there is no cause of action for a temporary diminution of a property's value."[55]

There are several points to consider with respect to the foregoing opinion, apart from the fact that it is illogical.

First, there is nothing in the RICO statutes or case law to support the conclusion that a sale or attempted sale is required before an injury to real property is deemed concrete and actual and thus recoverable. Given the fact that the injury itself impairs the ability to sell or otherwise alienate the property, and that more reliable evidence can be obtained from a certified appraiser, such a requirement would be unreasonable, particularly for property owners of modest means who have no practical alternative but to continue using their property.

Second, it is not true that if an injury to property is undone, the fact of its accrual is necessarily speculative or the amount and nature of the damages unprovable. A prejudgment attachment on a house, for example, which is

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[54]The instant action was filed Oct. 16, 1995. A motion to amend the complaint to add the RICO claims was filed April 29, 1996. In August 1996 defendants dismantled the tower. On Sept. 30, 1996, the district court granted the motion to amend the complaint.

[55]See Ruling page 18, Appendix pg. 13

not a physical invasion, dispossesion or disfigurement of property, is nevertheless an injury to property, whether or not the owner continues to use the property. Connecticut v. Doehr, 501 U.S. 1, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991) The fact of its accrual and the measure of damages can be precisely fixed, even if the attachment is lifted after the owner raises a RICO claim.

Likewise, in the case at bar, the fact that the injury was undone after petitioners raised a RICO claim does not automatically render the injury speculative. The only competent evidence in the record regarding the diminution in market value of petitioners' property on North School Road is the appraisal, which is specific as to the time period when the injury occured and the amount of damages.

The courts below focused on the wrong point in time in reaching the conclusion that "Even if the plaintiffs attempted to sell their property today, the radio tower is gone and would not affect the property's value."[56] The focus of the court's inquiry should have been time period relevant to the events alleged in the complaint, i.e., from August 12, 1986 until the complaint was filed Oct. 16, 1995,[57] not when the district court issued its ruling on March 23, 1998.

The fact that the radio tower was dismantled in 1996 proves that the defendants changed their behavior after petitioners raised a RICO claim; it says nothing about the validity of the appraisal.[58] Nor does it restore out-of-pocket expenses incurred by petitioners as a direct and forseeable

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[56]Ruling page 18 Appendix pg. 13

[57]All amendments relate back to the date of the original complaint. Fed. R. Civ. Proc. Rule 15(c)

[58]Evidence of subsequent remedial measures tends to be probative of culpable conduct. See Fed. Rules of Evidence, Rule 407

result of the conspiracy to violate the zoning regulations. See Appeal Brief pgs. 31-33 (Appendix pgs. 134-136)

Finally, the decision of the courts below is inconsistent with settled precedent that voluntary abandonment of allegedly illegal conduct does not deprive a plaintiff of standing. Gray v. Sanders, 372 U.S. 368, 375, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) U.S. v. W.T. Grant 345 U.S. 629, 73 S.Ct.894, 97 L.Ed 1303 (1953) See Appeal Brief pgs. 37-39 (Appendix pgs. 140-142) "[T]his Court has not ... embraced the general proposition that a wrong may be done, if it can be undone." Stanley v. Illinois, 405 U.S. 645, 647, 92 S.Ct. 1208, 1210, 31 L.Ed.2d 551 (1972)

CONCLUSION

Petitioners respectfully request the Court to grant this petition for a writ of certiorari. Summary judgment against petitioners should be reversed.

Susan Oygard, *pro se*
Norvald Oygard, *pro se*
235 North School Road
P.O. Box 62
Coventry, CT 06238
(860) 742-5209

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SUSAN OYGARD
NORVALD OYGARD
Plaintiffs,

v. **Civil No. 3:95CV2486 (DJS)**

TOWN OF COVENTRY,
COVENTRY TOWN COUNCIL,
JOAN LEWIS, ALAN KOEPKE, AND
RICHARD ASHLEY
Defendants.

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This is an action for damages in which the plaintiffs, Susan and Norvald Oygard, allege that the defendants, the Town of Coventry, the Coventry Town Council, John Elsesser, John [sic] Lewis, Alan Koepke and Richard A. Ashley: (1) violated certain of their rights protected by the federal civil rights law, 42 U.S.C. § 1983; (2) tortiously interfered with the plaintiffs' contractual relations; (3) breached the covenant of good faith and fair dealing; and (4) violated the federal racketeering law, 18 U.S.C. § 1964(c). The defendants now move for summary judgment on all of the plaintiffs' claims. The issues presented are: (1) whether the plaintiffs' right to have the town's zoning regulations enforced with respect to an adjacent property owner rises to the level of a property interest protected by the due process clause of the Fourteenth Amendment; (2) whether the plaintiffs have presented evidence that they have been selectively treated with bad faith or malice in violation of

the equal protection clause of the Fourteenth Amendment; (3) whether the plaintiffs' alleged devaluation of their property is too speculative an injury to confer upon them standing to maintain a civil action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961-68.

For the reasons that follow, the court concludes that the plaintiffs do not have a protected property interest in the town's proper enforcement of its zoning regulations with respect to an adjacent landowner. The court further concludes that the plaintiffs have failed to show that they have been selectively treated with bad faith or malice in violation of the equal protection clause of the Fourteenth Amendment. Finally the court concludes that the plaintiffs lack standing to maintain a civil action under RICO. The defendants' motions for summary judgment are therefore granted.

FACTS

Examination of the pleadings, affidavits, Rule 9 statements, and supporting materials discloses the following undisputed material facts. In 1978, the plaintiffs, Susan and Norvald Oygard, purchases a 43 acre parcel of land in the town of Coventry. In 1986, the defendant Alan J. Koepke, purchased a parcel of land located across the street from the plaintiffs' property. On August 7, 1986, the town's zoning enforcement officer issued to Koepke a permit to erect a telecommunications tower on his property. On August 12, 1986, the Oygards appealed that decision to the town zoning board of appeals.

On September 16, 1986, the board sustained the Oygards appeal and revoked Koepke's permit. On September 18, 1986, the zoning enforcement officer issued a stop work order with respect to the construction of the tower. On October 2, 1986, Koepke filed an appeal of the decision of the board to the superior court pursuant to CONN. GEN.

STAT. 8-8. On September 26, 1989, the court, Vasington, J. sustained Koepe's appeal, concluding that the board did not have subject matter jurisdiction to entertain the Oygard's appeal because that appeal had not been filed within the limitation period prescribed by CONN. GEN. STAT. 8-7 and because the board had failed to give proper notice of that hearing. The court reversed the board decision and ordered that the permit be reinstated.

On October 16, 1989, the Oygards appealed the decision of the superior court to the Connecticut appellate court. On August 27, 1991, the appellate court affirmed the trial court's decision on the basis that the board had failed to give proper notice of the hearing. The appellate court did not reach the issue of the timeliness of the plaintiffs' appeal to the zoning board. Koepke v. Zoning Board of Appeals, 25 Conn. App. 611 (1991). On July 28, 1992, the supreme court reversed and remanded to the appellate court the issue of whether the Oygards' appeal to the board was timely. Koepke v. Zoning Board of Appeals, 223 Conn. 171 (1992).

On remand, the appellate court determined that the Oygard's zoning appeal was untimely and, therefore, the Coventry zoning board of appeals lacked jurisdiction to entertain the appeal. On August 2, 1994, the Connecticut Supreme Court reversed the appellate court ruling and determined that the Oygards had filed a timely appeal to the zoning board of appeals. The supreme court remanded the matter to the zoning board of appeals to determine the merits of the Oygards' appeal. On June 6, 1995, the zoning board of appeals sustained the Oygards' appeal. On August 6, 1996, Koepke removed the tower from his property.

STANDARD

A motion for summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admisions on file, together with the affidavits, if any, show

that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is appropriate if, after discovery, the nonmoving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "The burden is on the moving party 'to demonstrate the absence of any material factual issue genuinely in dispute.'" American Int'l Group, Inc. v. London Am. Int's Corp.' 664 F.2d 348, 351 (2d Cir. 1981) (quoting Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1319-20 (2d Cir. 1975)). A dispute concerning a material fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)), cert. denied, 113 S.Ct. 440 (1992). The court must view all inferences and ambiguities in a light most favorable to the nonmoving party. Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir.), cert. denied, 502 U.S. 849 (1991). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." Id.

DISCUSSION

A. 42 U.S.C. § 1983

The defendants first move for summary judgment on the plaintiffs' claims brought pursuant to 42 U.S.C. § 1983.[1]

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[1]42 U.S.C. § 1983 provides:

Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subject, or causes to be subjected, any

In count one of the amended complaint, the plaintiffs allege that the defendants violated their Fourteenth Amendment rights to due process and the equal protection of the laws.

The defendants offer the following arguments in support of their motion with respect to the federal civil rights claim: (1) the plaintiffs have not been deprived of rights secured by federal law; (2) the benefits and uses of their property of which the plaintiffs' claim to have been deprived were not clear entitlements that could enjoy constitutional protection as property rights; (3) the defendants' acts did not cause any injury to the plaintiffs; (4) the defendants are not officials charged with enforcement of zoning regulations; (5) the plaintiffs have failed to produce facts to support a substantive due process claim; (6) the plaintiffs have failed to produce facts to support an equal protection claim; and (7) the plaintiffs' § 1983 claims are time barred.

In order to prevail on a claim brought pursuant to 42 U.S.C. § 1983, a plaintiff must first establish that "the defendant has deprived him of a right secured by the Constitution and the laws of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right .... under color of law." Adickes v. Kress & Co., 398 U.S. 144, 150 (1970).

The plaintiffs here assert a Fourteenth Amendment property right in the defendants' enforcement of certain zoning regulations. In order to prevail on this claim, the plaintiffs must establish that: 1) the enforcement of specific zoning regulations is a constitutionally protected property interest; 2) a city official with final decision making

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citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

authority deprived the plaintiffs of this protected interest under color of state law; and in so doing 3) the city denied the plaintiffs either: (a) substantive due process; (b) procedural due process; or the (c) equal protection of the laws. Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986); Terminate Control Corp. v. Horowitz, 28 F.3d 1345, 1348 (2d Cir. 1994) The court embarks upon this analysis "mindful of the general proscription that federal courts should not become zoning boards of appeal to review nonconstitutional land use determinations by the circuits's many local legislative and administrative agencies." Zahra v. Town of Southold, 48 F.3d 674, 679-80 (2d Cir. 1995).

1. Substantive Due Process

In order to survive summary judgment on the substantive due process claim, the plaintiffs must present evidence from which a reasonable jury could find that the defendant: 1) deprived the plaintiffs of their property right; 2) for a private, i.e., irrational or invidious purpose. Long Grove Country Club Estates v. Village of Long Grove, 693 F. Supp. 640, 657 (N.D. Ill. 1988) (citing Coniston Corporation v. Village of Hoffman Estates, 844 F.2d 461, 466-67 (7th Cir. 1988)). "[A] party must first establish that he has a valid property interest in a benefit that was entitled to constitutional protection at the time he was deprived of that benefit. This circuit uses a strict entitlement test to determine whether a party's interest in a land use regulation is protected under the Fourteenth Amendment." (citations omitted; internal quotation marks omitted) Zahra v. Town of Southold, 48 F.3d 674, 680 (2d Cir. 1995).

As noted above, the property interest plaintiffs claim to have been deprived of is the right to the proper enforcement of the town's zoning regulations with respect to an adjacent landowner's property. This is a singularly unusual claim because most due process challenges to land

use regulations involve a property owner who has been denied a permit or license that they claim they were entitled to. "[A] party may have a constitutionally protectable 'property interest' in a benefit that affects land use -- i.e. a building permit, certificate of occupancy, zoning variance, excavation permit or business license." Zahra v. Town of Southold, 48 F.3d 674, 681 (2d Cir. 1995). The plaintiffs do not, however, have a protected property interest in the town's proper enforcement of its zoning regulations as they relate to benefits conferred upon or denied other landowners. "No due process right is implicated here because the [plaintiffs] have no right to demand that the Municipal Defendants enforce the zoning laws. See DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189 (1988)." Gagliardi v. Village of Pawling, 18 F.3d 188, 192 (2d Cir. 1994). The plaintiff's alleged interest simply does not rise to the level of a protected property interest for the purposes of § 1983 litigation.

> Our precedents have firmly established that the mere violation of state law does not automatically give rise to a violation of federal constitutional rights: Indeed, even an outright violation of state law in the denial of a license will not necessarily provide the basis for a federal claim, at least where the applicant has a state law remedy. Otherwise every disappointed applicant, even though the state provided reasonably adequate redress, could invoke federal jurisdication on the claim that the state administrative body acted arbitrarily in violation of his federal due process rights. To permit an influx of such cases into federal court jurisdiction would violate principles of federalism, promote forum shopping, and lead to unnecessary state-federal conflict with respect to

> governing principles in an area principally of state concern.

Zahra v. Town of Southold, 48 F.3d 674, 682 (2d Cir. 1995) quoting Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54 (2d Cir. 1985). The court therefore concludes that, even though the plaintiffs may have been entitled to have the zoning regulations enforced under state law, that right does not constitute a property interest protected by the due process clause of the Fourteenth Amendment.

2. Procedural Due Process

Because the court concludes that the plaintiffs do not have a protected property interest, the court must also conclude that the plaintiff can not prevail on a procedural due process claim. The deprivation of a procedural right to be heard is not actionable when there is no protected right at stake. See Azizi v. Thornburgh, 908 F.2d 1130, 1134 (2d Cir. 1990). Even assuming, however, that the plaintiffs did have a protected property interest, the court would nontheless find that the defendants were entitled to summary judgment on the procedural due process claim.

A procedural due process analysis proceeds in two steps.

> The theshold issue is always whether the plaintiff has a property or liberty interest protected by the Constitution. If a protected interest is identified, a court must consider whether the government deprived the plaintiff of that interest without due process. The second step of the analysis thus asks what process was due to the plaintiff, and inquires whether that constitutional minimun was provided in the case under review.

Narumanchi v. Bd. of Trustees of Conn. State Univ., 850 F.2d 70 (2d Cir. 1988) (citing Mathews v. Eldridge, 424 U.S. 319 (1976)). A deprivation of a property interest must be protected by "notice and opportunity for hearing appropriate to the nature of the case." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1984) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)). However, the Supreme Court has also stated that "post deprivation remedies made available by the State can satisfy the due process clause." Paratt v. Taylor, 451 U.S. 527, 538 (1981). Thus, "due process is flexible and calls for such procedural protection as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471 (1972).

The court concludes that the plaintiffs' procedural due process claim must fail. In the present case the plaintiffs took full advantage of their opportunity to be heard by pursuing their claims at the zoning level, the superior court, the appellate court and the supreme court. Not only did the plaintiffs take full advantage of their opportunity to be heard, but they succeeded when they did so. The court therefore concludes that the plaintiffs have not been deprived of any due process rights protected by the Fourteenth Amendment.

3. Equal Protection

The defendants next move for summary judgment of the plaintiffs' equal protection claim. The defendants contend that the plaintiffs have failed to demonstrate either that: (1) they were treated differently from other similarly situated persons; or (2) that such selective treatment was based upon the malicious or bad faith intent to injure the plaintiffs. The court agrees.

The "Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is essentially a direction that all persons similarly situated should be treated

alike.'" City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985). "The equal protection guarantee of the Fourteenth Amendment does not take from the states all power of classification." Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 271 (1979). "When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern." Id. at 272.

In order to prevail on a claim that the defendants denied them of the equal protection of the law, the plaintiffs must show:

> 1) the person, compared with others similarly situated, was selectively treated, and 2) the selective treatment was motivated by an intention to discriminate on the basis of impermissable considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person.

FSK Drug Corp. v. Perales, 960 F.2d 6, 10 (2d Cir. 1992) (citations omitted)

The court finds that the plaintiffs did not meet their burden in establishing either prong of the test announced in FSK Drug Corp. v. Perales, 960 F.2d 6 (2d Cir. 1992). The plaintiffs have failed to produce any evidence that other similarly situated landowners were treated differently than they were treated. The complaint is devoid of any allegation that the municipal defendants would have enforced the zoning regulations at the request of another resident whose situation was similar to the Oygards. In the absence of such factual assertions, the plaintiffs equal protection claim is insufficient as a matter of law. Gagliardi v. Village of Pawling, 18 F.3d 188, 193 (2d Cir. 1994).

Even assuming that the plaintiffs had demonstrated that they had been selectively treated by the town, the plaintiffs have failed to present any evidence that would create a material issue of fact with respect to the second prong of the the equal protection analysis. Because the plaintiffs do not fall under any protected class, such as race or religion, the plaintiffs must demonstrate that they were selectively treated because of a bad faith or malicious intent to injure them. The plaintiffs have neither alleged nor offered any evidence in support of this conclusion.

In order to establish an equal protection violation, the plaintiffs must prove that the defendants intended to discriminate against them, and not merely that they sought to confer benefits upon Koepke. This, however, is not what the plaintiffs claim. The plaintiffs claim the the defendants "knowingly encouraged, participated in, and financially benefitted from, defendant Koepke's unlawful activities: and that they "knowingly or with reckless disregard for the Oygard's right to equal protection and due process ... conspired to violate the zoning laws of the state of Connecticut." Amended Complaint. "Discriminatory purpose .... implies more than an intent as volition or intent as awareness of consequences. It implies that the decision maker ... selected or reaffirmed a particular course at least in part 'because of' and not merely 'in spite of' its adverse effects upon an identifiable group." (citations omitted; internal quotation marks omitted) Personnel Administrator of Massachussetts v. Feeney, 442 U.S. 256, 279 (1979). Because the plaintiffs have failed to produce any evidence, or even to allege, that the conspiracy was undertaken with the bad faith or malicious intent to injure them, the equal protection claim must fail.

Because the court concludes that: (1) the plaintiffs have not identified a property interest protected by the due process clause of the Fourteenth Amendment; and (2) the plaintiffs have failed to show disparate treatment or

discriminatory animus as required by the equal protection clause of the Fourteenth amendment, the court will not consider the defendants' remaining grounds for summary judgment. The court has considered the plaintiffs' remaining arguments with respect to the federal civil rights claim and finds them to be without merit.

B. RICO Claims.

In count four of the amended complaint, the plaintiffs seek civil remedies under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961-68. Specifically, the plaintiffs claim that the defendants conspired to provide the town with free radio service in return for the town's failure to enforce the zoning regulations. The complaint alleges that, as a result of this conspiracy, the "plaintiffs' property was devalued."

The defendants argue that the plaintiffs lack standing to assert a RICO claim because their alleged losses, the devaluation of their property, is too speculative to maintain a civil action under RICO. The court agrees.

The civil liability provisions of RICO confer standing upon "[a]ny person injuried in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). "[A] showing of injury requires proof of concrete financial loss, and not mere injury to a valuable intangible property interest." Oscar v. University Students Co-Operative Association, 965 F.2d 783, 795 (9th Cir. 1992) cert. denied, 506 U.S. 1020, 113 S.Ct. 655, 121 L.Ed.2d 581 (1992). "Absent a showing sufficient to establish the existence of actual injury, summary judgment is required." Berg v. First State Ins. Co., 915 F.2d 460, 464 (9th Cir. 1990).

Damages under RICO are "unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable." Bankers Trust Company v. Rhoades, 859 F.2d 1096, 1104 (2d Cir. 1988) quoting Zenith Radio Corp. v.

Hazeltine Research, Inc., 401 U.S. 321, 338 (1971). In Oscar v. University Students Co-Operative Association, supra, the court upheld the dismissal of the plaintiff's RICO claim because the plaintiff

> has not alleged any financial loss which would be compensable under RICO ... The only injury she has alleged is a 'decrease in the value of her property' due to the racketeering activity next door. We do not believe that such a decrease entails financial loss to Oscar.

Oscar v. University Students Co-Operative Association, 965 F.2d 783, 786 (9th Cir. 1992) cert. denied, 506 U.S. 1020, 113 S.Ct. 655, 121 L.Ed.2d 581 (1992). The court noted that Oscar had never attempted to sublet the apartment or even that she wished to sublet the apartment. The court therefore found that "any supposed loss is purely speculative." Id. at 787.

In the present case, the plaintiffs claim to have sustained a diminution in the value of their property. Such a diminution in value, however, was a transient condition because, as is undisputed, the offending radio tower has been removed from the adjacent property. There is no cause of action for a temporary diminution of a property's value. Further, the alleged loss in the value of the property would obtain only in the event the plaintiffs sold or attempted to sell the property. Even if the plaintiffs attempted to sell the property today, the radio tower is gone and would not affect the property's value. The court therefore concludes that the plaintiffs' alleged injuries are too speculative to confer standing to maintain a civil RICO claim. See Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 24 (2d Cir. 1990) (An injury in the form of lost business commissions is "too speculative to confer standing, because [the plaintiff] only alleges that he would have lost commissions in the future, and not that he has lost any yet."); In re Taxable

Municipal Bond Securities Litigation; 51 F.3d 518 (5th Cir. 1995) (the allegation of lost opportunities to secure a loan too speculative to constitute a RICO injury); Steele v. Hospital Corporation of America, 36 F.3d 69 (9th Cir. 1994) (speculative injuries do not serve to confer standing under RICO until they become concrete and actual). Because the complaint alleges only that "the plaintiffs' property was devalued," the court concludes that the alleged damages are too speculative to constitute an injury to property within the meaning of RICO.

The court has considered the plaintiffs' remaining arguments with respect to the RICO claim and finds them to be without merit.

C. Pendant Claims

It is axiomatic that when all federal claims are eliminated prior to trial, a federal court should decline to exercise jurisdiction over any remaining state law claims. Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 (1988); DeLaura v. Power Authority of New York, 982 F.2d 73, 80 (2d Cir. 1992).

CONCLUSION

For the foregoing reasons, the defendants' motions for summary judgment (document numbers 81 and 83) are granted and the plaintiffs motions for summary judgment (document numbers 76 and 77) are denied. The defendant town's motion to strike (document number 90) is denied and the plaintiffs' motion to dismiss (document number 98) is denied. The clerk is directed to close the file.

SO ORDERED this 23rd day of March, 1998 at Hartford, Connecticut.

s/ Dominic J. Squatrito
Dominic J. Squatrito
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Susan Oygard and Norvald Oygard

v. **Civil 3:95 CV 2486 DJS**

Town of Coventry, Coventry Town Council, John Elsesser, Joan Lewis, Alan Koepke, and Richard A. Ashley

JUDGMENT

This action came before the Honorable Dominic J. Squatrito, United States District Judge on cross-motions for summary judgment by the plaintiffs and the defendants as to the plaintiff's complaint and the municipal defendants' counterclaim. The court has reviewed all of the papers filed in this matter and on March 23, 1998, entered its Ruling on Cross Motions for Summary Judgment, granting the defendants' motions for summary judgment, denying the plaintiffs' motions for summary judgment, denying the defendants' motion to strike and denying the plaintiffs' motion to dismiss.

There are no further pending claims to be considered and therefore, it is ORDERED, ADJUDGED and DECREED that summary judgment is entered in favor of the defendants and the case is closed.

Dated at Hartford, Connecticut, this 24th day of March, 1998.

KEVIN F. ROWE, Clerk
By. s/ Victoria C. Minor
Victoria C. Minor
Chief Deputy Clerk

CTDC/hact
95-cv-2486
Squatrito

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 1st day of December, one thousand nine hundred and ninety-eight.

[United States Court of Appeals
Filed Dec 1 1998
Carolyn Clark Campbell, Clerk
Second Circuit]

PRESENT:

HON. GUIDO CALABRESI
HON. ROBERT D. SACK
HON. SONIA SOTOMAYOR
Circuit Judges.

SUSAN C. OYGARD, NORVALD OYGARD,
Plaintiffs-Counter-Defendants-Appellants,

v.

SUMMARY ORDER
98-7578

TOWN OF COVENTRY,
COVENTRY TOWN COUNCIL,
JOHN ELSESSER, JOAN LEWIS,
and RICHARD A. ASHLEY,
Defendants-Counter-Claimants-Appellees.

ALAN J. KOEPKE
Defendant-Appellee.

Appearing for Appellant:	SUSAN OYGARD, *pro se* NORVALD OYGARD, *pro se* Coventry, CT.
Appearing for Appellees Town of Coventry, Coventry Town Council, Joan Lewis, John Elsesser, and Richard Ashley:	THOMAS R. GERARDE, Howd & Ludorf, Hartford, CT.
Appearing for Appellee Alan Koepke:	DUNCAN J. FORSYTH, Sandler, Hatcher & Goldstein P.C., Hartford, CT.

Appeal from the United States District Court for the District of Connecticut (Dominic J. Squatrito, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and hereby is REMANDED.

Plaintiffs Susan and Norvald Oygard appeal from a decision of the United States District Court for the District of Connecticut (Dominic J. Squatrito, *Judge*), granting summary judgment to the defendants on the plaintiffs' federal claims. The plaintiffs brought this action in state court seeking damages against the Town of Coventry, the Coventry Town Council, John Elsesser, Joan Lewis and Richard A. Ashley as members of the Coventry Town Council, and Alan Koepke. The defendants removed the case to the district court. The plaintiffs alleged that members of the Town Council, acting in concert with Alan Koepke, deliberately failed to enforce the town's zoning laws against Koepke to preclude the building of a communications radio tower on property he owns across the street from property owned by the plaintiffs. Their complaint alleged violations of 42 U.S.C. § 1983, the federal civil rights law, and 18 U.S.C. § 1964(c), a provision of the federal racketeering statute ("RICO").

Finding that the plaintiffs had failed to demonstrate a violation of substantive due process, procedural due process, or equal protection, the district court entered summary judgment on behalf of the defendants on the Oygards' § 1983 claim. Concluding additionally that the Oygards could not allege any "concrete financial loss" in the value of their of their property -- as the radio tower has now been

removed -- the district court found that the Oygards lacked standing to make out a RICO claim.[1]

We can add little to the analysis of the district court on the plaintiffs' federal claims, and we find that the granting of summary judgment on behalf of the defendants was appropriate for substantially the reasons stated in that court's opinion. *See Oygard v. Town of Coventry et.al.*, No. 95 Civ. 2486 (D.Conn. Mar. 23, 1998).

We note only one additional point. The plaintiffs' complaint also alleged a number of state law claims, over which the district court declined to exercise jurisdiction once it had entered summary judgment against the plaintiffs on their federal claims. The court's decision to decline to exercise jurisdiction over the plaintiffs' state law claims was

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[1]After filing their complaint in this matter as well as their RICO case statement in the district court, the plaintiffs -- in summary judgment papers -- alleged an additional RICO injury: the incurring of substantial legal fees to appeal the town council's zoning decision. Under this Circuit's decisions in *Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158 (2d Cir. 1993), and *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), legal fees may, in limited circumstances, qualify as an injury compensable under the RICO statute. In the instant case, however, legal fees incurred by the plaintiffs were not proximately caused by a RICO violation, as were those in *Bankers Trust*. See 859 F.2d at 1105 (recognizing as a RICO injury the expenditure of legal fees incurred in fighting a debtor's frivolous satellite lawsuits); *see also In re American Express Co. Shareholder Lit.*, 39 F.3d 395, 399-400 & n.3 (2d Cir. 1994) (precluding recovery by a party who was neither the target of the racketeering activity nor its intended victim). The plaintiffs therefore cannot allege a RICO injury on this alternate ground.

proper, *see* 28 U.S.C. § 1367(c)(3), but the district court should have remanded the state law claims to the state court, rather than dismissing the plaintiffs' action altogether. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 357 (1988). Thus, we return the case to the district court so that it may in turn remand the plaintiffs' state law claims to state court.[2]

The judgment of the district court is remanded for proceedings consistent with this opinion.

For the Court,

CAROLYN CLARK CAMPBELL

By: s/ Ralph A. Anderson

Ralph A. Anderson
Acting Operations Manager

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[2]It is unclear from the record whether the district court ruled on the Town of Coventry's motion for summary judgment on its counterclaim dealing with the contractual release signed between the plaintiffs and the town. *See Oygard v. Town of Coventry et. al.*, No. 95 Civ. 2486 (D. Conn. Mar. 23, 1998); *Oygard v. Town of Coventry et. al.*, No. 95 Civ. 2486 (D. Conn. Mar, 24, 1998). If the defendants still wish to have a ruling on that motion, they may, of course, ask the district court to rule on it during remand proceedings.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SUSAN C. OYGARD NORVALD OYGARD	:	CIVIL ACTION NO. 3:95 CV 02486 DJS
v.	:	
TOWN OF COVENTRY, COVENTRY TOWN COUNCIL, JOHN ELSESSER, JOAN LEWIS ALAN J. KOEPKE and RICHARD A. ASHLEY	:	OCTOBER 30, 1996

AMENDED COMPLAINT[1]

FIRST COUNT: 42 U.S.C. § 1983

1. Plaintiffs Susan and Norvald Oygard (hereinafter "Oygards") are, and have been at all times relevant to the events described herein, owners and occupants of real property at 235 North School Road in the Town of Coventry. Said property is located in the RU-40 rural residential zone.

2. Defendant Town of Coventry is a municipal corporation organized and existing under the laws of the State of Connecticut.

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[1]The original complaint has been amended to add counts three and four and to clarify that the allegations in counts one and two concern only the time period up to the date of the original complaint, October 16, 1995.

3. Defendant Coventry Town Council (hereinafter "Council") is inter alia the executive body of local government.

4. Defendant Joan Lewis is named as a defendant both individually and in her official capacity as a member of the Coventry Town Council. Defendant Lewis was a member of the Coventry Town Council from on or about Nov. 6, 1985 until on or about Nov. 4, 1993. She was Chairman of the Coventry Town Council from on or about Nov. 6, 1985 until on or about Nov. 6, 1991.

5. Defendant Richard Ashley is named as a defendant both individually and in his official capacity as chairman of the Coventry Town Council as of October 16, 1995.

6. The Council has the power and duty to engage a town attorney. In no case may the Council perform the duties of town attorney.

7. Attorney Abbot Schwebel, of the firm Schwebel, Burke, Hall, Pigeon & Gnutti P.C., located at 130 Union Street, P.O. Box 757, Rockville, CT 06066, was the Coventry town attorney from prior to August 7, 1986 until 1994.

8. The Council has the power to appoint, and may revmove, a town manager who is the chief executive officer of the town as defined by § 7-193 of the Connecticut General Statutes.

9. Defendant town manager is the sole contact to employ the services of the town attorney for any board, agency, commission or officer.

10. Defendant town manager is the purchasing agent for the Town.

11. Defendant town manager is directly responsible to the Council for the administration of all offices and agencies in charge of persons appointed by him and supervises and directs the same.

12. The town manager has the power and duty to appoint a chief of police.

13. The chief of police is responsible for the enforcement of the laws of the state and the ordinances of the town and all the rules and regulations made in accordance therewith.

14. Defendant John Elsesser is named as a defendant both individually and in his official capacity as Town Manager of the Town of Coventry. Defendant Elsesser has been said Town Manager since on or about May 6, 1988.

15. Defendant Alan J. Koepke, (hereinafter "Koepke") , is a principal in the firm of Communications and Electronics, located at 1976 Boston Turnpike, Coventry, CT. Communications and Electronics is in the business of selling and servicing two-way radio equipment, to inter alia, fire and police departments and local governments.

16. On July 22, 1986 defendant Koepke purchased a parcel of land in an RU-40 rural residential zone on North School Road directly across the street from the Oygard property.

17. On August 7, 1986, Koepke obtained a zoning permit #10109 from former Coventry zoning agent Robert Isner (hereinafter "Isner") for a "two-way radio antenna site

for public safety, fire, police, highway, amateur and business radio system" (hereinafter referred to as the "tower") on his North School Road property. Said zoning permit was based on a plot plan, signed and dated August 7, 1986 by Isner.

18. On August 12, 1986, pursuant to Conn. Gen. Stat. 8-7, plaintiff Susan Oygard appealed Isner's decision to issue said zoning permit to the Coventry Zoning Board of Appeals.

19. Also on August 12, 1986, zoning agent Isner informed Koepke by telephone that Oygards' appeal had been filed.

20. Between August 13 and August 15, 1986 defendant Koepke telephoned Jonathan Kriesberg, then a member of the Coventry Planning and Zoning Commission. Jonathan Kriesberg specifically told Koepke that the tower was not permitted in the zone.

21. On August 18, 1986 Koepke poured the concrete footings for the radio tower.

22. On August 19, 1986, Koepke received a certified letter dated August 18, 1986 from zoning agent Isner stating that an appeal had been filed on August 12, 1986.

23. In violation of Conn. Gen. Stat. 8-7, Koepke continued construction of the radio tower after August 19, 1986.

24. At a hearing on September 16, 1986, the Zoning Board of Appeals voted to revoke Koepke's zoning permit for the tower. Defendant Koepke was present at said hearing.

25. On September 18, 1986 defendant Koepke received a stop work order from zoning agent Isner stating inter alia that "work is being prosecuted contrary to the decision of the Coventry Zoning Board of Appeals on September 16, 1986. Such work shall be immediately stopped. Work may be resumed under the following conditions: under the authority of a restraining order granted by the Superior Court of Connecticut." The stop work order was for permit # 10109.

26. Koepke continued work on the tower after receiving said stop work order.

27. On or about September 23, 1986, defendant Koepke received a certified letter dated September 23, 1986 from zoning agent Isner reminding him that a stop work order had been issued on September 18, 1986.

28. Koepke continued work on the tower after receiving said letter.

29. On or about September 26, 1986 defendant Koepke received a second stop work order signed by the building official John Willnauer which said "Any person who shall continue any work in or about a building after having been served with a stop work order ... shall be liable to a fine of not less than or more than $500. Each day that a violation continues shall be deemed a separate offense." Said stop work order was for permit # 10109.

30. Koepke continued work on the tower after receiving said September 26, 1986 stop work order.

31. On October 2, 1986, pursuant to Conn. Gen. Stat. 8-8, Koepke filed an appeal of the Sept. 16, 1986 decision of the Zoning Board of Appeals to the Superior Court. (Koepke

v. Coventry Zoning Board of Appeals et. al. 230 Conn. 452) Plaintiff Susan Oygard was named as a defendant in that suit.

32. In his complaint dated October 2, 1986 and in his substituted complaint[2] dated April 20, 1988, defendant Koepke asked the court to "restrain the defendant Board and town officials from interfering with completion of construction of the radio tower and its operation during the pendancy of this appeal." Defendant Koepke never obtained such a restraining order from the superior court or any other court.

33. In violation of Conn. Gen. Stat. 8-8(g) Koepke continued work on the tower after October 2, 1986.

34. On November 3, 1986, at a regular Town Council meeting, several citizens, including the plaintiff Susan Oygard protested the continued construction of the radio tower on North School Road. Town Attorney Schwebel was in attendance at that meeting and advised the Council, chaired by defendant Lewis, that the Zoning Board of Appeals had properly recinded defendant Koepke's zoning permit.

35. By 1987 defendant Koepke's tower was unlawfully operating and was being used without a certificate of zoning compliance pursuant to Conn. Gen. Stat. 8-3(f) or a certificate of occupancy pursuant to § 29-265 of the Connecticut General Statutes and § 15.4 of the Coventry Zoning Regulations then in effect.

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[2]In plaintiffs' original complaint, the date of this document was erroneously cited as May 18, 1988.

36. On May 18, 1987 plaintiff Susan Oygard attended a Town Council meeting and pointed out that the tower was operating and that work on the tower was continuing in violation of the stop work orders. Defendant Lewis presided at said Council meeting as chairman.

37. By letter dated May 22, 1987 former town attorney Schwebel advised then town manager Harold Hodge and defendant Lewis, as chairman of the Coventry Town Council, that the "town has several courses of action it can take to stop the operation, which is the transmission of radio waves from the tower. One is to seek a zoning violation through the criminal court system and the other is to seek an injunction for violation of the stop work order." The Council instituted no legal action against defendant Koepke.

38. In a separate action for damages, by Complaint dated May 18, 1988, (Koepke v. Town of Coventry Docket # CV-88-0040263S still pending as of October 16, 1995), Koepke sought permanent injunctive relief "preventing the Town of Coventry and its agents, officials boards and commissions from prohibiting the plaintiff [Koepke] from completing construction and utilizing his communication tower facility." Koepke never obtained such injunctive relief.

39. On September 26, 1989 a trial court decision, adverse to the Coventry Zoning Board of Appeals and Susan Oygard, was rendered in the case of Koepke v. Coventry Zoning Board of Appeals et. al. (Vasington, J)

40. On October 10, 1989, the defendant Town Council, chaired by defendant Lewis, voted not to appeal the trial court decision against the Coventry Zoning Board of Appeals. On October 10, 1989, the defendant Town of

Coventry, or certain of its agencies, was unlawfully using defendant Koepke's North School Road radio tower.

41. On October 16, 1989, Susan Oygard appealed the trial court decision to the appellate court.

42. At no time did any court lift the automatic stay of the trial court decision pursuant to C.P.B. § 4046.

43. While Koepke v. Coventry Zoning Board of Appeals et. al. was pending before the appellate court, defendant Koepke signed a boundary agreement modifying the shape and size of his North School Road property. Koepke's property in its configuration as of October 16, 1995 is depicted on an A-2 survey dated December 15, 1990. Defendant town officials are aware that defendant Koepke 's tower, as depicted on his December 15, 1990 survey, violates setback requirements and that at no time did defendant Keopke have a zoning permit, building permit, or certificate of occupancy for any structure based on his December 15, 1990 plot plan.

44. In 1991 defendant Koepke attempted to obtain a certificate of occupancy for his radio tower. By letters dated May 6, 1991 and May 10, 1991, town attorney Schwebel advised then zoning agent Sara England not to issue a certificate of zoning compliance. Defendant Koepke never had a certificate of zoning compliance or certificate of occupancy for his tower.

45. Defendant Town Manager John Elsesser was explicitly notified by letter dated May 9, 1991 that there was no certificate of zoning compliance for the tower. The Coventry Chief of Police is well aware of the issues surrounding the tower and so stated in a letter dated April 4, 1995. In May of 1991 and until at least October 16, 1995 defendant Town Manager's office was connected to

Defendant Koepke's North School Road radio tower and the Coventry Police Department was unlawfully using defendant Koepke's tower.

46. On August 2, 1994 the Connecticut Supreme Court (230 Conn. 452) directed that the case be remanded to the Coventry Zoning Board of Appeals to determine, upon proper public notice, the merits of Oygard's appeal.

47. On April 18, 1995 the Coventry Zoning Board of Appeals held a public hearing on the merits of Oygard's appeal.

48. On June 6, 1995 the Coventry Zoning Board of Appeals voted unanimously to sustain the appeal of Susan Oygard.

49. On June 19, 1995, pursuant to Conn. Gen. Stat. 8-8, defendant Koepke appealed the June 6, 1995 decision of the Zoning Board of Appeals to the Superior court, Koepke v. Coventry Zoning Board of Appeals et. al. Docket # 95-0058273S. Plaintiff Susan Oygard is a defendant in that suit. In violation of Oygard's right to equal protection and due process under Conn. Gen. Stat. 8-8, guaranteed by the 14th Amendment to the U. S. Constitution, and until at least October 16, 1995, defendant Koepke in collaboration with defendant town officials continued to unlawfully operate his North School Road radio tower.

50. Taxpayers of the Town of Coventry are neither unknowing nor blameless. Several articles about the tower controversy were published in local newspapers. Until at least October 16, 1995, Koepke provided radio services free or at below market rates to the taxpayers of the Town of Coventry. For nine years, taxpayers avoided paying taxes to purchase radio services at fair market value.

51. Several times since her appeal to the Coventry Zoning Board of Appeals was filed on August 12, 1986, plaintiff Susan Oygard, and other neighbors attended town council meetings and urged the council to enforce the decision of the Zoning Board of Appeals revoking defendant Koepke's zoning permit. Several letters were sent to the Council urging the Council to enforce the zoning laws. Susan Oygard spoke personally with Defendants Lewis and Ashley and Elsesser urging them to enforce the law and not to violate the law.

52. The Zoning Board of Appeals has no independent authority derived from the town charter, to engage an attorney to enforce its decisions or to defend itself in a legal action. Defendant town officials know, or reasonably ought to know, that the interests of the Town or certain of its agencies in obtaining free use of Koepke's North School Rd. radio tower is directly adverse to the interests of the Coventry Zoning Board of Appeals in maintaining the viability of the Coventry Zoning Regulations. Until at least October 16, 1995, defendant town officials obstructed justice and denied Oygard her 14th Amendment right to due process and equal protection by collaborating with and accepting free service from defendant Koepke while the town attorney, under their exclusive control, was representing the Coventry Zoning Board of Appeals in Koepke v. Coventry Zoning Board of Appeals et. al. Docket # 95-0058273S. There is nothing in the Town Charter which prevents the town council from hiring other counsel when deemed necessary.

53. In a continuing course of unlawful conduct since August 12, 1986, and until at least October 16, 1995, (for town officials named individually, in a continuing course of conduct during their term of office), and in violation of Title 42 U.S.C. § 1983, defendants, acting under color of state

law, wilfully, knowingly or with reckless disregard for Oygards' rights to equal protection and due process, guaranteed by the 14th Amendment to the U.S. Constitution, conspired to violate the zoning laws of the State of Connecticut, including C.G.S. 8-7 and 8-8, and the zoning regulations of the Town of Coventry. There was a mutuality of purpose between Koepke and the defendant town officials which purpose was that Koepke unlawfully build and unlawfully operate a commercial radio tower in a residential zone in Coventry and provide the Town of Coventry with free radio services, and the defendant town officials breach their duty to enforce "the laws of the state and the ordinances of the town and all the rules and regulations made in accordance therewith" (Town Charter § 5-16) It was also to the purpose that Koepke recover money from the Town's insurance company by suing the Town for damages falsely claiming that construction on the tower terminated upon the issuance of the stop work order on September 18, 1986.

54. Plaintiffs have given notice to the town as required by § 7-465 C.G.S., which notice is attached hereto as Exhibit A.

55. Acting under color of state law, in violation of 42 U.S.C. § 1983, and in furtherence of their conspiracy to deny plaintiffs the protection of the Coventry Zoning Regulations and state zoning statutes, defendants intentionally inflicted emotional distress on plaintiffs. In 1986, while defendant Lewis was chairman of the Town Council, plaintiff Susan Oygard was advised, in writing on town letterhead, not to speak out on the subject of the tower without first checking with then town manager Harold Hodge and that "further pronouncements might evoke actions contrary to your wishes". In 1990, after plaintiff Susan Oygard had appealed the trial court decision in the case of Koepke v. Coventry Zoning Board of Appeals et. al.,

defendant town officials made it clear to plaintiffs that using town funds, they could and would outspend the Oygards in the courts. In 1993, defendant Koepke threatened to sue Oygard for "vexatious litigation" if Oygard petitioned the Supreme Court for review of the appellate court decision rendered Feb. 23, 1993 in the above referenced case. In 1994, shortly after the oral argument before the Supreme Court, held March 31, 1994, defendant Koepke telephoned plaintiff Susan Oygard and told her he would turn his property into a "cemetary for Oygards" if he couldn't keep his tower there.

56. As a direct result of the actions of the defendants, Oygard's property was devalued, the Oygards incurred legal expenses in excess of $60,000, and the Oygards suffered anxiety and emotional distress for nine years.

WHEREFORE, with respect to Count 1, the plaintiffs pray for:

1) Compensatory damages with interest for lost property value, legal expenses and emotional distress.

2) Punitive damages of not less than or more than $500 per day for each and every day since August 12, 1986, which amount is no more than and no less than the amount town officials would fine a private citizen who violates a stop work order, (See ¶ 29 above.); all of such punitive damages to be paid directly to a charitable organization, trust, or foundation of Oygard's choice.

3) Such other and further relief as this court may deem just and proper.

SECOND COUNT: TORTIOUS INTERFERENCE WITH CONTRACT

1. Paragraphs 1-55 of the first count are hereby made paragraphs 1-55 of the second count.

56. The town attorney has the power, with the approval of the Council, to compromise or settle any claims by or against the town.

57. Plaintiff Susan Oygard attended executive sessions of the Coventry Town Council on November 28, 1986, May 28, 1987 and October 5, 1987. Defendant Joan Lewis presided at said executive sessions as chairman. Plaintiff Oygard's neighbor, Carole Miller was also in attendance at said executive sessions.

58. At said executive sessions an oral agreement was reached whereby the Oygards would not sue the Town for the actions of the zoning agent Isner, and the Town of Coventry would pay Oygards' entire legal bill for the suit Koepke v. Coventry Zoning Board of Appeals et.al. It was further agreed that defendant town officials would enforce the Coventry Zoning Regulations against defendant Koepke, and, in the event of an adverse ruling by Judge Vasington, the Town would appeal such ruling to the Appellate Court.

59. Defendant town officials repeatedly misrepresented to plaintiff Susan Oygard their commitment to enforce the law against Koepke. On May 18, 1987, while Susan Oygard was present, the Town Council unanimously passed a resolution to pursue the violation of the stop work order on the Koepke tower with the town attorney and to take punitive action against Koepke. By letter dated May 22, 1987, town attorney Schwebel advised the Council that there were several courses of action the town could take to stop

the operation of the tower. Despite its resolution passed on May 18, 1987, defendant town officials took no action against Koepke.

60. On or about Nov. 14, 1989, defendant Elsesser falsely assured Oygard the town would thenceforth enforce the Coventry Zoning Regulations against defendant Koepke.

61. The Town delayed paying any part of Oygard's legal bill until after the trial court decision in the case of Koepke v. Coventry Zoning Board of Appeals et. al. was rendered September 26, 1989.

62. After said trial court decision was rendered, Oygard was informed that the Town would not appeal Judge Vasington's decision; it would not pay her legal expenses if she appealed; and it would not pay her outstanding legal bill unless she agreed to these new terms.

63. Plaintiff felt compelled to accept these terms but added the condition that the town seek an injunction for removal of defendant Koepke's radio tower if Susan Oygard's appeal of Judge Vasington's decision was successful. An agreement to that effect was reached between Oygard's attorney Mark Branse, Esq. and town attorney Abbot Schwebel as set forth in a letter dated October 30, 1989, from Abbot Schwebel to Mark Branse, copies to defendants Lewis and Elsesser. (Exhibit B)

64. At its regular meeting November 6, 1989, defendant town council, chaired by defendant Lewis, authorized defendant town manager John Elsesser to execute the "Resolution Authorizing the Settlement of Claim Against the Town of Coventry by Susan and Norvald Oygard". (Exhibit C)

65. In accordance with the terms of said Resolution, the Oygards gave the Town a General Release. (Exhibit D)

66. On December 11, 1989 plaintiff Susan Oygard discovered that the defendant Town of Coventry was using Koepke's tower. Until then defendant town officials had fraudently indicated to plaintiffs they didn't know who was using defendant Koepke's tower.

67. On March 12, 1990, plaintiff Susan Oygard attended an executive session of the finance committee of the Coventry Town Council. Defendants Lewis, Elsesser and Koepke were present at said executive session. Oygard's neighbor Jim O'Connor was also present. No attorneys were present.

68. At said March 12, 1990 meeting, defendants Lewis and Elsesser admitted the Town was using Koepke's North School Road tower. Defendants Lewis and Elsesser both indicated that the Town would continue to do so regardless of the outcome of Oygard's appeal to the appellate court. When Oygard pointed out the town had agreed to seek an injunction for removal of the tower according to the agreement in the Resolution cited in ¶ 63 above, defendant Lewis told Oygard the town would simply renege on that agreement.

69. By collaborating with defendant Koepke, defendant town officials caused Oygard's appeal of Judge Vasington's decision to be more expensive or burdensome and made a sham of settlement discussions as more fully set forth in the "Statement of Susan Oygard to the Coventry Zoning Board of Appeals" dated April 18, 1995 page 33 which document is Return of Record # 17 in the pending case of Koepke v. Coventry Zoning Board of Appeals et. al. Docket # CV-95-0058273-S.

70. In a continuing course of improper conduct since November 15, 1989 and until at least October 16, 1995 (in the case of defendant Lewis from November 15, 1989 until November 6, 1993 when she left the town council), defendants knowingly or recklessly and in bad faith interfered with a contract between the Oygards and the Town of Coventry, causing plaintiffs emotional distress and financial losses for which plaintiffs seek compensatory and punitive damages.

WHEREFORE, with respect to Count 2, plaintiffs pray for:

1) Compensatory damages with interest.

2) Punitive damages equal to twice the amount the defendant Town would have paid at fair market value for radio services received from defendant Koepke, plus twice the gross amount defendant Koepke received from all of his commercial customers for use of the North School Road radio tower since 1987; all of such punitive damages to be paid directly to a charitable organization, trust, or foundation of Oygard's choice.

3) Such other and further relief as this Court may deem just and proper.

THIRD COUNT: (MUNICIPAL DEFENDANTS ONLY)
BREACH OF THE COVENANT OF
GOOD FAITH & FAIR DEALING

1. Paragraphs 1 - 69 of count two are hereby made paragraphs 1-69 of count three.

70. Since November 15, 1989 and until at least October 16, 1995 (in the case of defendant Lewis from November 15, 1989 until November 6, 1993), in a continuing course of improper conduct and bad faith, defendants breached the covenant of good faith and fair dealing implicit in the contractual agreement between the Town of Coventry and plaintiffs, causing plaintiffs emotional distress and financial losses for which plaintiffs seek compensatory and punitive damages.

WHEREFORE, with respect to count 3 plaintiffs pray

1) Compensatory damages with interest.

2) Punitive damages to be paid directly to the following organization:

Kennedy Krieger Institute
Neurogenetics Unit
Rett Syndrome Research Program
707 North Broadway
Baltimore, MD 21205

3) Such other and further relief as this Court may deem just and proper.

FOURTH COUNT: 18 U.S.C. § 1964(c)

1. Paragraphs 1 - 55 of the first count are hereby made paragraphs 1 - 55 of the second count.

56. Defendant John Elsesser, as the purchasing agent for the town of Coventry (See count one ¶ 10) and as an employee of the Town of Coventry appointed by the defendant Town Council (See count one ¶ 8), purchases supplies and goods manufactured outside the state of Connecticut.

57. Defendant Coventry Town Council is a legal entity defined by Chapter III of the Coventry Town Charter. Defendant Coventry Town Council is an enterprise within the meaning of Conn. Gen. Stat. § 53-394. The defendant Town Council is an enterprise that affects interstate commerce.

57. In violation of § 53a-147 and § 53a-148 of the Connecticut General Statutes, defendant Koepke conferred upon municipal defendants the benefit of free radio service as consideration for the decision by municipal defendants to use his radio tower on North School Road. The decision by municipal defendants to use defendant Koepke's radio tower was necessarily a decision not enforce the zoning regulations of the Town of Coventry and the state statutes governing the Oygard appeal to the Coventry Zoning Board of Appeals.

58. In a continuing course of conduct for at least the past five years and until at least October 16, 1995, (the date of the original complaint), defendant Koepke conferred upon municipal defendants every month a benefit estimated to be worth $2,800 per month.

59. In violation of Title 18 U.S.C. § 1962(d) municipal defendants and defendant Koepke conspired to violate 18 U.S.C. § 1962(c) and 18 U.S.C. § 1962(a) by conducting the affairs of the Coventry Town Council through a pattern of racketeering activity where "racketeering activity" is defined in 18 U.S.C. § 1961 to include violations of § 53a-147 and § 53a-148 of the Connecticut General Statutes.

60. As a direct result of the racketeering activities of the defendants, plaintiffs property was devalued.

WHEREFORE, with respect to count 4 plaintiffs pray for :

1) Treble damages with interest for lost property value and attorneys fees.
2) Such other and further relief this Court may deem just and proper.

PLAINTIFFS

NORVALD AND SUSAN OYGARD
235 North School Rd.
P.O. Box 62
Coventry, Conn. 06238

s/ Norvald Oygard

s/ Susan Oygard

[Not reproduced here:

Exhibit A - Letter of intent to sue from Oygards to Town Clerk, dated March 9, 1995

Exhibit B - cover letter to Resolution from Abbot Schwebel to Mark Branse cc. Joan Lewis, John Elsesser dated October 30, 1996

Exhibit C - Page 6 Regular Town Council Meeting Minutes dated Nov. 6, 1989

Exhibit D - Release signed by Norvald and Susan Oygard dated Nov. 14, 1989]

Exhibit B

RESOLUTION
AUTHORIZING SETTLEMENT OF CLAIM
AGAINST THE TOWN OF COVENTRY
BY SUSAN AND NORVALD OYGARD

BE IT RESOLVED:

WHEREAS, Susan and Norvald Oygard are residents of North School Road, Coventry, Connecticut, and

WHEREAS, the town of Coventry issued a zoning permit for the erection of a radio tower on property of Alan Koepke on North School Road, in violation of the Coventry Zoning Regulations, and

WHEREAS, Susan and Norvald Oygard have a claim against the town of Coventry as a result of the illegal issuance of the zoning permit allowing construction of the tower,

NOW, THEREFORE BE IT RESOLVED:

1. The town of Coventry shall pay Susan and Norvald Oygard the sum of $7,500.00 in full and complete settlement of all claims that they may have against the town of Coventry, its employees, agents or independent contractors, arising out of the issuance of the zoning permit to construct the radio tower.

2. As a condition of this payment, Susan and Norvald Oygard shall execute a General Release to the town of Coventry in a form acceptable to the Coventry Town Attorney.

3. The town of Coventry agrees that, if the appeal of the decision by Judge Vasington in the case entitled Koepke vs. Coventry Zoning Board of Appeals, et.al., Superior Court Tolland County, Docket No. CV , is successful before the Appellate Court, and that Appellate

Court agrees that the zoning permit issued by the town of Coventry Zoning Agent was improperly issued, and is no longer valid, and further that the tower erection is in violation of the Coventry Zoning Regulations, the town would, within a reasonable time period after the case is concluded, take appropriate legal action against Mr. Koepke to seek removal of the radio tower, and would prosecute such action to its conclusion. Such conclusion may include, at the option of the town, an appeal, if, in the opinion of the town it is in the best interest to seek such appeal.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SUSAN C. OYGARD NORVALD OYGARD	: :	CIVIL ACTION NO. 3:95 CV 02486 DJS
v.	:	
TOWN OF COVENTRY, COVENTRY TOWN COUNCIL, JOHN ELSESSER, JOAN LEWIS ALAN J. KOEPKE, and RICHARD A. ASHLEY	:	MARCH 31, 1997

MOTION FOR SUMMARY JUDGMENT

Pursuant to F.R.C.P. 56, plaintiffs move for summary judgment on all counts. Pursuant to Local Rule 9(c) a separate, short, and concise statement of the material facts as to which there is no genuine issue to be tried is annexed as Appendix A. Pursuant to Local Rule 9(a) a Memorandum of Law is attached.

STATEMENT OF FACTS[1]

Defendant Koepke is a principal in the firm of Communications and Electronics located at 1976 Boston Turnpike, Coventry, Connecticut. Communications and Electronics is in the business of selling and servicing

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[1] 'Ex.' denotes Exhibit to plaintiffs' Motion for Summary Judgment. 'ex.' denotes deposition exhibit. A table of Exhibits is attached as Appendix B.

two-way radio equipment to *inter alia* fire and police departments and state and local governments. (Ex.1, p.10, ex.5, ¶1) As of 1995, defendant Koepke owned or operated five commercial radio towers in Connecticut, located in Colchester, Willimantic, Danielson, Meriden and Coventry. (Ex.1, pp.10,11) Defendant Koepke has had a business relationship with the Town of Coventry since 1968. (Ex.1, p.11)

Plaintiffs Norvald and Susan Oygard own 42.97 acres on North School Road in Coventry which they purchased in 1978, with the intention of building their own home on a portion of the property and eventually subdividing the rest. Plaintiffs built their home as planned in a corner of the property, leaving 40 acres of raw land available for development.(Ex.2)[2]

On June 6, 1986 defendant Alan Koepke appeared before the newly hired[3] zoning agent of the Town of Coventry, Robert Isner, and presented to Isner a plot plan depicting a commercial radio tower defendant Koepke proposed to build on North School Road. (Ex.1, ex.5, ¶ 5) The proposed site of the radio tower, owned at the time by Josephine Jacquemine (See map, Ex.5), was a nonconforming lot of record in an RU-40 rural residential zone located directly across the street from plaintiffs' property.

In June of 1986, at the time he approached the zoning agent for a zoning permit, defendant Koepke offered free use

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[2]Coventry is located approximately 18 miles east of Hartford with a population around 11,000 and annual budget of approx. $ 19 Million. (See Elsesser Deposition, Ex.4, p.12)

[3]Zoning Agent Isner was employed by the Town of Coventry from April 1986 until June 1988. See Ex.3, p.2

of the proposed tower to the Coventry highway department and the Coventry fire departments. He also offered free use to Jeff Vannais of Tolland County Mutual Aid. Former Coventry town manager Harold Hodge was aware of defendant Koepke's offer of free service. (Ex.6, #12) (Ex.7, ex.3) The building inspector was also a prospective free user. (Ex.8, #2)

On July 11, 1986 zoning Agent Isner issued a zoning permit to defendant Koepke. On July 22, 1986, defendant Koepke purchased the subject property on North School Road for $8,500. (Ex.1, p.12, ex.5, ¶ 13).

When plaintiffs (and abutters) Norvald and Susan Oygard, learned of the issuance of defendant Koepke's zoning permit, they brought to Isner's attention a recent Connecticut superior court case (Ex.7, ex.1) in which the court held that a 130 foot microwave tower in an RU-40 zone in Coventry violated the maximum height requirements of the zone. Defendant Koepke was aware of the microwave tower lawsuit (Ex.1, p.13) and he knew exactly where the microwave tower was to have been situated.[4] Defendant Lewis who was chairman of the Coventry Town Council in 1986, was also aware of the microwave tower lawsuit. (Ex.7, p.15)

After reviewing the matter, zoning agent Isner "requested that [Koepke] make certain alterations to the plans for the proposed radio tower and submit a new plot plan. [Koepke] made the requested changes and submitted a new application, together with a revised plot plan, to the zoning enforcement officer [Isner]. On August 7, 1986, the

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[4]See Ex.9, Koepke's testimony to the Coventry Zoning Board of Appeals September 16, 1986, p.25, 26. Note: the 1985 microwave tower decision was not appealed and the microwave tower was never constructed.

zoning enforcement officer, ... issued [Koepke] a new permit bearing the same number as the previous permit. The zoning enforcement officer also gave [Koepke] contemporaneous written notification that his July 11 permit had been revoked." Koepke v. Zoning Board of Appeals 230 Conn. 452, 454 (1994)

When plaintiff Susan Oygard learned that Isner had issued a new zoning permit on August 7, 1986, (Ex.1, ex.1) she filed an appeal to the Zoning Board of Appeals (hereinafter ZBA). "[O]n August 12, 1986, [plaintiff Susan Oygard] appealed to the board challenging the validity of the August 7, 1986 permit on the grounds that its issuance adversely affected her property and that the radio tower was not permitted by the applicable zoning regulations." Id. p. 454

Isner telephoned defendant Koepke on August 12, 1986 to notify him that the Oygard appeal had been filed and to advise him not to proceed with construction. (See Ex.3, pg.30)

On August 18, 1986, contrary to the advice of zoning agent, but encouraged by the Coventry building inspector, defendant Koepke poured the concrete footings and foundations for the radio tower. (Ex.1, ex.5, ¶ 22)

On August 19, 1986, defendant Koepke received a certified letter dated August 18 from zoning agent Isner stating that an appeal had been filed on August 12 and that a public hearing was scheduled for September 16, 1986. (Ex.1, p.14) By letter dated August 19, 1986, former town manager Harold Hodge advised town attorney Abbot Schwebel and the Town Council, chaired by defendant Lewis, that the Oygard appeal was pending before the Zoning Board of Appeals. (Ex.7, ex.2)

Notwithstanding receipt of a certified letter notifying him of the Oygard appeal, defendant Koepke proceeded to construct a concrete block building to house the transmitters and the generator for the radio tower between August 20,

1986 and September 10, 1986. (Ex.1, p.15) Between September 11 and September 13, 1986 he erected the steel tower on the site. (Ex.1, p.16)

On September 16, 1986 the Zoning Board of Appeals held a public hearing on the Oygard appeal and revoked the permit that had been issued to defendant Koepke on August 7, 1986. See Koepke v. Zoning Board of Appeals 230 Conn. 452, 454 (1994). Reports of the September 16, 1986 ZBA hearing were published in the Hartford Courant and the Willimantic Chronicle. (Ex.7, ex. 3,4 & 5)

Defendant Koepke was present at the September 16, 1986 hearing. (Ex.1, p.16) On September 16, 1986, there were no public utilities connected to the tower (Ex.1, p.16,27,28) and defendant Koepke's tower was not operational. Notwithstanding the decision of the ZBA, defendant Koepke continued work on the tower after the September 16, 1986 public hearing.

On September 18, 1986 Zoning Agent Isner issued a Stop Work Order. (Ex.1, p.18, ex.2) Defendant Koepke continued work on the tower after receipt of the September 18, 1986 Stop Work Order.

Isner sent defendant Koepke a certified letter dated September 23, 1986 reminding him that a Stop Work Order had been issued. (Ex.1, p.20) On September 26, 1986 the building inspector, John Willnauer, also issued a Stop Work Order. (Ex.1, pp. 20,21)

On October 2, 1986 defendant Koepke filed an administrative appeal of the ZBA decision naming Susan Oygard as a defendant pursuant to C.G.S. § 8-8(f). (Ex.1, p.21) In his administrative appeal defendant Koepke stated that he was the "owner of the property for which the Zoning Board of Appeals has now revoked the applicable zoning permit" and he requested that the court "restrain the defendant Board and town officials from interfering with completion of construction of the radio tower and its operation during the pendency of this appeal." (Ex.1, ex.5, ¶

39 et seq.) The following day, on October 3, 1986, without court authority, defendant Koepke installed a utility meter on his tower. (See Ex.10) Thereafter he commenced operation of the tower. (Ex.11)(Ex.1 pp.21,27) No restraining order was ever issued by the court.

Attorney Abbot Schwebel, of Schwebel, Burke, Hall, Pigeon and Gnutti of Rockville, Conn. was the Coventry town attorney in 1986 (Ex.7, p.16) and he filed an appearance on behalf of the ZBA in the matter of Koepke v. Zoning Board of Appeals. The Oygards retained attorney Mark Branse of Glastonbury, Conn.

On November 3, 1986, several citizens including plaintiff Susan Oygard attended a Coventry Town Council meeting chaired by defendant Lewis to protest the continued construction of the tower. Town attorney Abbot Schwebel was in attendance at that town council meeting and advised the Council that the ZBA had properly recinded defendant Koepke's zoning permit.(Ex.7,p.21-23) By letter dated November 5, 1986, (Ex.7, ex.16), former town manager Harold Hodge wrote to Town Attorney Abbot Schwebel stating:

> The radio tower on North School Road that was disallowed by the ZBA is now in operation and the stop work order was torn down and discarded. I have personally visited the site. The power is on with the meter running.

Thereafter, former town manager Harold Hodge began to suspect that the Coventry building inspector might be using defendant Koepke's North School Road tower. He asked his secretary, Constance Anderson, to make some telephone calls. The results of Constance Anderson's inquiries, which she recorded, (Ex.12), confirmed the

suspicions of the town manager, but were never disclosed to the town attorney, or to the Oygards.[5] Not only was the town attorney not informed of Constance Anderson's findings, the town attorney was misled when he discussed the matter of stop work order violations with the building inspector. (Ex.7, p.27,28, ex.16) (Ex.1 p.27,28).

On November 7, 1986 defendant Koepke amended his administrative appeal (Ex.1, pgs. 22-24)[6]. He also filed a second lawsuit entitled Koepke v. Isner in which he sought "a temporary and/or permanent injunction ordering the Defendants to rescind the Stop Work Order of September 18, 1986." (Ex.1, pp. 23-24)(Ex.7, pp.24-25). Defendant Koepke never obtained such an injunction.

On November 17, 1986 plaintiff Susan Oygard again urged the Town Council to take action to enforce the decision of the ZBA. (Ex.7, pp. 25-26) By letter dated November 17, 1986, (Ex.7, pp.19-21, ex.7), and in response to her letter dated October 21, 1986 (Ex.13, #10) plaintiff Susan Oygard was advised by former town manager Harold

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[5]See also Ex.1, Koepke Deposition p. 67:

ATTY FORSYTH: With regard to the Town of Coventry, for what period of time have you provided them with free access anywhere?

MR. KOEPKE: I would say from early 1986.

ATTY FORSYTH: And on what towers did you provide free access or use to the Town of Coventry?

MR. KOEPKE: Storrs, Lebanon, and ultimately in Coventry.

[6]Koepke's October 2, 1986 administrative appeal was combined with the November 7, 1986 amendments and submitted as the substituted complaint dated April 20, 1988 referenced in Plaintiffs Amended Complaint ¶ 32.

Hodge that "Further pronouncements may evoke actions contrary to your wishes."

The tower had reduced the market value of plaintiffs' 40 acres of undeveloped land across the street by $47,000, and significantly reduced development potential. See Final Comments of Appraiser (Ex.2):

> This is a unique situation with really nothing to compare it to. However, I feel fairly certain that a large majority of potential buyers would not be interested in the property given the tower location. Having said that I am of the opinion that the value of the property has decreased by at least 50%

Because of the impact on property values, plaintiffs and other neighbors were considering filing a lawsuit against the Town. On November 28th,1986 plaintiff Susan Oygard and neighbors Carole Miller and Archie Haynes attended an executive session of the Coventry Town Council. (Ex.7, p.27, ex.14) An agreement was discussed at the November 28th meeting whereby, if the Oygards and other neighbors refrained from suing the Town, the Town would pay Oygard's attorneys fees in the matter of Koepke v. ZBA and enforce the zoning regulations against defendant Koepke.

By December 14, 1986, there were at least 7 antennas on the North School Road tower and the tower was transmitting. (Ex.1, pp.26-27, ex.8) One of the first users of defendant Koepke's tower was Jeff Vannais (Ex.6, #2) of Tolland County Mutual Aid. On January 28, 1987, an FCC license was issued to Tolland County Mutual Aid showing transmitters at North School Road at the longitude and latitude of Koepke's tower. (Ex.18) That license would be renewed on Nov. 8, 1991 (Ex.19), and again on Nov. 12, 1996. (Ex.20)

On February 2, 1987 plaintiff Susan Oygard again appeared before the defendant town council chaired by defendant Joan Lewis, and urged the Council not to allow further work on the tower. Defendant Lewis assured plaintiff Susan Oygard that the Town Council would not sanction any further work on the tower. (Ex.7, p.28-30)

In the spring of 1987 work continued however. (Ex.1, p.29) By letter dated May 2, 1987 plaintiff Susan Oygard again wrote to the defendant Town Council urging the Council to take action. (Ex.13, #10) A copy of the May 2, 1987 letter was sent to ZBA chairman Kathleen Ryan. Kathleen Ryan visited the site on Sunday, May 17, 1987 and found that indeed someone was working at the tower. She observed that the individual working on the tower hid behind the left rear axle of his vehicle (a brown service truck) as she passed by. (Ex.7, ex.20) Defendant Koepke owned a brown service truck in 1987. (Ex.1, p.28)

On May 18, 1987, plaintiff Susan Oygard again attended a regular meeting of the Coventry Town Council and pointed out that violations of the stop work order were continuing.(Ex.7, pp.30-31) At that meeting, while plaintiff Susan Oygard was present, the defendant Town Council unanimously passed a resolution to pursue the violation of the stop work order on the Koepke tower with the town attorney and to take punitive action. (Ex.7, pp.30-31) Thereafter Defendant Lewis received a letter from Town Attorney Schwebel dated May 22, 1987 expressly stating that the Town had several courses of action it could take to stop the operation of the tower. (Ex.7, p.31, ex.19) On May 28, 1987 plaintiff Susan Oygard and her neighbor Carole Miller again met with the defendant Town Council (See Ex.21) to discuss the agreement by the Town Council to pay Oygard's legal fees. The defendant Town Council assured plaintiff Susan Oygard it would pay her legal expenses and enforce the zoning regulations against defendant Koepke.

At its May 19, 1987 meeting, the Coventry Zoning Board of Appeals also discussed stop work order violations at the Koepke tower on North School Road. (Ex.7, pp.31-32) The ZBA moved to have [zoning agent] Bob [Isner] draft a letter to send to defendant Joan Lewis expressing the Board's "deep concern over the problems of this tower being built without anyone's consent to do so." (See ZBA meeting minutes May 19, 1987, Ex.7, ex.20,21) At the June 1, 1987 Town Council meeting the Town Council put off a discussion of the ZBA concerns to a tentatively scheduled future meeting of the parties involved - a meeting that never took place. (Ex. 22) The defendant Town Council took no action against defendant Koepke, despite the resolution it had passed two weeks earlier when plaintiff Susan Oygard was present.

In September of 1987 defendant Koepke made arrangements to have a telephone installed at the North School Road tower. He was told by a SNET representative that he would have to obtain a house number before a phone could be installed and that his telephone number at the tower would be 742-1650. The address of the radio tower therefore became 200 North School Road. (See Ex.23 and Ex.24) Defendant Koepke met with a SNET representative at the tower on September 17, 1987. (Ex.1, pp.29-30, ex.11)

At the same time, during September of 1987, an effort by Oygard's attorney Mark Branse, Koepke's attorney Marshall Berger and town attorney Abbot Schwebel was made to settle the Koepke tower litigation. (Ex.1, pp.30-31) (Ex.7, pp.32-33) The status of the settlement discussions, as recorded in a letter dated September 21, 1987, (Ex.1, p.30) (Ex.7, ex.22) was reviewed during an executive session of the defendant Town Council on October 5, 1987. (Ex.25) At the October 5, 1987 executive session, the Town Council again assured plaintiff Susan Oygard they would pay all of Oygard's legal bills and asked for an accounting of Oygard's bill to date. They also assured plaintiff Susan Oygard they

would appeal if there were an adverse ruling by the trial court. The 1987 settlement discussions were unsuccessful. Town Manager Harold Hodge resigned effective November 16, 1987. (Ex.12, #5) Coventry Chief of Police Frank Trzaskos became acting Town Manager until defendant Elsesser was hired the following May. (Ex.7, p.16)

In 1988 negotiations between Oygard's attorney Mark Branse and Town Attorney Abbot Schwebel were held concerning payment of plaintiff Susan Oygard's legal fees. (See Ex.26) The Town proposed hiring Oygard's attorney Mark Branse as co-counsel with Abbot Schwebel and paying him directly. It was decided to postpone implementation of the plan however until the case reached the appellate stage.

In May of 1988 the Coventry Town Council hired defendant John Elsesser as Town Manager. (Ex.27 #2) Also in May of 1988 defendant Koepke withdrew Koepke v. Isner and filed Koepke v. Town of Coventry (Ex.1, p.32) (Ex.7, p.33) (Ex.4, pp.12-13) in which he sought both an injunction and monetary damages. In Koepke v. Town of Coventry defendant Koepke claimed that he terminated all further construction on the site as a result of the issuance of the stop work order September 18, 1986, (Ex.1, p.32, ex.12, ¶ 30) - a fact which defendant Lewis, for one, knew to be false. Defendant Koepke again sought, but never obtained, permanent injunctive relief "preventing the Town of Coventry and its agents, officials, boards and commissions from prohibiting the plaintiff from completing construction and utilizing his communication tower facility." (Ex.1, p.32, ex.12, ¶ 36)

At the beginning of 1989, with defendant Elsesser established as Coventry's Chief Executive Officer, and both Koepke v. ZBA and Koepke v. Town of Coventry pending, Coventry fire and police departments initiated proceedings to obtain FCC radio station licenses to use defendant Koepke's North School Road tower. Application for an FCC radio station license involves several steps and usually takes

between four to six months. (Ex.1, p.35) FCC Radio Station licenses showing transmitter locations at 200 North School Road were issued to the Coventry Volunteer Fire Department on June 29, 1989 (Ex.4, ex.2) and to the Coventry police department and local government (Ex.4, ex.3 and 4) on July 24, 1989. Given a four to six month lead time, proceedings to obtain those licenses must have been initiated between January and March of 1989.

By Town Charter § 5-1, (Ex.28), the Town Manager appoints the director of civil defense, the building official, the chief of police and fire marshals. By Charter § 6-2, (Ex.28), the Town Manager is directly responsible to the Town Council for the administration of all offices and agencies in charge of persons appointed by him, and supervises and directs the same. The Town Manager works closely with the Town Council Chairperson on implementing Council directives. (Ex.4, p.11) Neither defendant Elsesser nor defendant Lewis attempt to explain how Town of Coventry fire, police and civil defense FCC radio station licenses showing transmitter locations at 200 North School Road came to be issued while the trial court was hearing testimony in Koepke v ZBA between May and July of 1989. (Ex.29) (Ex.2) (Ex.7, pp.34-35) (Ex.4, pp.13-14)

By letter dated August 24, 1989 (Ex.30) Oygard's attorney Mark Branse urged Town Attorney Schwebel to finalize the agreement concerning payment of Oygard's legal fees, but implementation of the agreement was again delayed by the municipal defendants. On September 26, 1989 the trial court, (Vasington, J.), rendered a decision in defendant Koepke's favor in the administrative appeal Koepke v. Coventry Zoning Board of Appeals that had been filed October 2, 1986.

With a trial court decision in Koepke's favor, the defendant Town Council reconsidered its previous agreement to pay Oygard's legal fees and to appeal an adverse ruling by the trial court. By letter dated October 10,

1989, (Ex.31) Oygard's attorney Mark Branse urged Town Attorney Schwebel to remind the Council of its commitment. But at the Town Council meeting that night, the Town Council indicated that they would not pay the $9,692 legal bill incurred by Susan Oygard (Ex.32) and they voted not to appeal the trial court decision. (Ex.33)

On October 16, 1986 plaintiff Susan Oygard, petitioned the Connecticut Appellate Court for review of the trial court decision. (Ex.34) By letter of the same date (Ex.35) to defendant Elsesser, the Oygards proposed a new settlement to the Town Council. The Oygards proposed to give the Town a general release if the Town would pay $7,500 toward Oygards' outstanding legal bill and agree to commence an action for injunction against Mr. Koepke to secure removal of the radio tower if the Oygard appeal was successful before the Appellate Court. Attorney Schwebel drafted a "Resolution Authorizing Settlement of Claim Against the Town of Coventry By Susan and Norvald Oygard" which he forwarded to Oygards' attorney by letter dated October 30, 1989, with copies to defendants Lewis and Elsesser. (Complaint Exhibit B)

Unaware that the Town was using defendant Koepke's tower, and having relied on the assurances that the Town would pay their legal fees, and relying on the Town's commitment to seek an injunction for removal of the tower in accordance with ¶ 3 of the Resolution, plaintiffs Norvald and Susan Oygard agreed to the Resolution drafted by Attorney Schwebel.

On November 6, 1989 (Complaint Exhibit C) in executive session, the defendant Town Council, chaired by defendant Lewis passed the "Resolution Authorizing Settlement of Claim Against the Town of Coventry By Susan and Norvald Oygard". Two days later on November 8, 1989, (Ex.36) without consulting with the town attorney, the South Coventry Volunteer Fire Department, with the after-the-fact approval of defendant Elsesser (Ex.4, p.16),

installed a utility meter on defendant Koepke's tower so that the Town could pay its electric bill directly.[7]

On or about November 14, 1989 plaintiff Susan Oygard met with defendant Elsesser to give him a general release in accordance with the terms of the Resolution cited above. (Complaint Exhibit D) Defendant Elsesser assured plaintiff Susan Oygard he would thenceforth see to it that the zoning regulations were enforced against defendant Koepke.

By Town Charter § 5-10 (Ex.28) the defendant Town Manager is the sole contact to employ the services of the town attorney for any board, agency, commission or officer. Defendant Elsesser admits he has only "peripheral" familiarity with the Connecticut Rules of Appellate Procedure[8], and he is unaware of the details of "zoning intricacies" such as setback requirements (Ex.4, p.15) yet defendant Elsesser never sought legal advice from the town attorney about the legality of using defendant Koepke's tower. (Ex.4, p.15) He never asked the town attorney about the operative effect of appellate review on a trial court decision. He never asked the town attorney about the ramifications of using defendant Koepke's tower while Koepke's suit for monetary damages, Koepke v. Town of Coventry was still pending. He never asked the town attorney what to do about the stop work orders. He never asked the town attorney about the enforceability of the "Resolution Authorizing a Settlement of a Claim Against the

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[7]The account name on that meter would later be changed from the 'South Coventry Volunteer Fire Department' to 'Office of the Coventry Town Manager' (See Ex.37)

[8]Defendant Elsesser's attorney noted for the record that he's not very familiar with the Connecticut Rules of Appellate Procedure either. (Ex.4, p.15)

Town of Coventry By Susan and Norvald Oygard." He received a copy of a letter dated December 19, 1989, from the town attorney to the Coventry Zoning Agent advising the Zoning Agent **not** to issue a certificate of occupancy for defendant Koepke's radio tower (Ex.4, p.16) - even then he did not seek legal advice.

Defendant Lewis dosen't know what the Town Council policy was with respect to using defendant Koepke's tower, even though she was chairman of the Town Council from 1985 until 1991. (Ex.7, p.37) She was copied on two letters, one dated December 8, 1989 from Oygard's attorney Mark Branse to town attorney Abbot Schwebel, and the other dated December 19, 1989 from Town Attorney Abbot Schwebel to the Coventry Zoning Agent, both clearly indicating that there was **no certificate of occupancy** for defendant Koepke's tower. (Ex.7, pp.35-36, ex.27,28) Defendant Lewis admits to "hearsay" knowledge that the Town was using defendant Koepke's tower, (Ex.7, p.38) yet she has no recollection of a request for advice from the Council to the Town Attorney regarding use of the tower. (Ex.13, #5) (Ex.7, p.52)

In November and December of 1989 another attempt to settle the litigation took place. Jim and Janet O'Connor, who had purchased a 90 ± acre parcel of land across the street from plaintiffs' Norvald and Susan Oygard, offered defendant Koepke $50,000 for his North School Road property as part of a settlement agreement that would involve moving the tower. On or about November 16, 1989 Jim O'Connor, plaintiff Susan Oygard and defendants Koepke and Elsesser met in the board room of the Coventry Town Hall to discuss the possibility of moving the tower, but the cost of relocating the tower, which had been estimated to be around $50,000 in 1987 (Ex.1, p.31) had risen to $250,000 by November of 1989 (Ex.1, p. 37-40) and settlement discussions fell apart.

On December 11, 1989, from reading a Willimantic Chronicle newspaper article, (Ex.38) plaintiff Susan Oygard discovered that the defendant Town of Coventry was using defendant Koepke's tower. In the article defendant Elsesser was quoted as saying "we have equipment now on the tower .." and "Koepke does not charge the town for using his tower,... He could easily turn around and say he wants to lease the space." Defendant Lewis was also quoted in the article as saying that the Town wanted to upgrade its radio equipment and had been appropriating funds for a year to do it.

In February of 1990, the Connecticut Appellate Court required the parties in Koepke v. ZBA to meet for the purpose of considering the possibility of settlement. (Ex.1, p.41, ex.17) The parties - Mr. Koepke with his attorney, Susan Oygard with her attorney and her neighbor Janet O'Connor, and Town Attorney Abbot Schwebel - met with retired State Supreme Court Justice Joseph Dannehy at Windham Courthouse on March 6, 1990 to discuss two settlement options, one of which was to move the tower to the Coventry Town Hall, and the other to move the tower to a light industrial zone in Coventry owned by Norman Nadeau.

On March 12, 1990, at an executive session of the Town Council finance committee, plaintiff Susan Oygard, her neighbor Jim O'Connor and defendant Koepke met with defendants Lewis and Elsesser to apprise them of the settlement options discussed with Justice Dannehy on March 6. No attorneys were present. (Ex.7, p.42)(Ex.4, p.17)(Ex.1, p.44-45) Defendants Lewis and Elsesser agreed to investigate the possibility of moving the tower, and indicated they would hire a consultant to advise them. They also informed plaintiff Susan Oygard that if a settlement could not be reached they intended to continue using Koepke's tower on North School Road regardless of the Appellate Court decision; if necessary they would take Koepke's

property by emminent domain. When plaintiff Susan Oygard reminded municipal defendants of the November 1989 settlement agreement between the Oygards and the Town, defendant Lewis informed plaintiff Susan Oygard that the Town would simply renege on that agreement and the Oygards could take whatever legal action they liked.

The following week, on March 19, 1990, at a regular Town Council meeting, Janet O'Connor met in executive session with the Town Council, chaired by Defendant Lewis, to make an offer to facilitate settlement. (Ex.7, pp.42,43,47,48)(Ex.4, p.18) Defendant Lewis remembers that Mrs. O'Connor made an offer to the Town at one point, but as defendant Lewis put it, Mrs. O'Connor didn't offer enough money. (Ex.7, p.48)

At that same March 19, 1990 Town Council meeting, defendant Lewis and the rest of the Council voted unanimously to authorize the town attorney to seek to enforce the proper zoning regulations against the property owner of 42 Autumn Trail. (Ex.7, p.43) The following month they would vote to authorize the town attorney to take legal action to enforce the zoning regulations against the property owner of 1171 Grant Hill Road. (Ex.7, p. 45)

For a fee of approx. $2,500 the Town Council hired radio consultant, Robert Fairbairn. (Ex.27, #7) On May 17, 1990 a meeting was held with Mr. Fairbairn in the board room of the Town Hall to discuss the settlement options. Present were defendants Koepke and Elsesser, plaintiff Susan Oygard and her attorney Mark Branse, Town Attorney Abbot Schwebel, radio consultant Robert Fairbairn, and Janet O'Connor. Defendant Elsesser distributed a summary of the alternatives being considered. (Ex.4, ex.8)

Thereafter by letter dated May 21, 1990, Robert Fairbairn advised defendant Elsesser of his conclusions regarding the alternatives that had been discussed at the May 17, 1990 meeting. (Ex.4, p.19, ex.9)

At the May 21, 1990 Town Council meeting defendant Elsesser reported to the Town Council that the state's radio frequency clearing house was not in favor of moving the tower to the town hall. (Ex.7, p.46)(Ex.4, p.20)

The Hartford Courant published an article on May 24, 1990 about the proposal to move the tower to the town hall. (Ex.4, ex.11) Defendant Elsesser read the May 24th article in which James Blesso, administrator for the Bureau of Statewide Emergency Telecommunications, reportedly said that the town had not filed an application requesting a change and that "We can't make a judgment until we know far more about what is planned." (Ex.4, pp.20,21)

Janet O'Connor also read the May 24, 1990 Hartford Courant article and thereafter telephoned defendant Elsesser and offered, as a last resort, if neither of the options discussed at the May 17, 1990 meeting proved feasible, to build a tower on her property for the Town's emergency communication use only. By letter dated May 30, 1990, and copied to Janet O'Connor, defendant Elsesser wrote to Robert Fairbairn about Janet O'Connor's latest proposal, and requested that the subject matter of the letter not be revealed to defendant Koepke. Janet O'Connor thereupon wrote to Robert Fairbairn herself to clarify the nature of her offer and make it clear that she wished Mr. Koepke to be kept informed of any further developments. (Ex.4, ex.12)

By letter dated May 30, 1990, Town Attorney Abbot Schwebel advised defendant Elsesser that the Appellate Court expected the appeal of Judge Vasington's decision to move forward.(Ex.4, ex.14) By letter dated June 1, 1990, Robert Fairbairn advised defendant Elsesser that the latest O'Connor offer was a viable alternative to using defendant Koepke's North School Road tower. (Ex.4, p.22, ex.13) Defendant Elsesser never disclosed to either the Oygards or the O'Connors (Ex.4, p.22) the existence or the contents of Robert Fairbairn's June 1, 1990 letter. Defendant Elsesser never responded at all to Janet O'Connor's last offer, (Ex.39,

pp.27-29) and the 1990 settlement discussions ended in failure.

The 1990 settlement discussions, that had been initiated by the Court, took place over a period of three months, from March of 1990 until the beginning of June 1990 when they fell apart. On April 6, 1990, in the middle of those settlement discussions, defendant Elsesser signed a purchase order to purchase $12,994 worth of radio equipment from defendant Koepke. (Ex.4, ex.15) (Ex.1, pp.49-51, ex.22) Included on that purchase order was a transmitter combiner for $6,495, a base radio for $1,495 and battery back-up system for $845 which were to be used on defendant Koepke's North School Road tower. (Ex.1, p.50) In April of 1990, defendant Elsesser also connected the Town Manager's office to Defendant Koepke's North School Road tower. See Koepke Deposition page (Ex.1) page 51:

> MRS. OYGARD: In your answer to my interrogatory, ... you indicated that the Manager's office began use of the tower on or about April 6, 1990. Are you saying that in the middle of court-sponsored settlement discussions, in which the Town Manager participated, that the Town Manager hooked up his own office to your tower?
> MR. KOEPKE: Yes

Conspicuously absent from all settlement discussions was the Coventry Zoning Board of Appeals, the named defendant in Koepke v. ZBA. Like the Coventry Town Council, the Coventry Zoning Board of Appeals is an elected body, but unlike the Town Council, it has no independent authority derived from the Town Charter to engage an attorney to enforce its decisions or other legitimate interests. (Ex.28)

In 1990 a discrepancy in the boundary line of defendant Koepke's North School Road property surfaced. (Compare survey of Jacquemine property (Ex.5) with the plot plan attached to defendant Koepke's August 7, 1986 zoning permit. (Ex.1, ex.1) On March 28, 1991, the O'Connors and defendant Koepke signed a boundary agreement (Ex.40) whereby the boundaries between the O'Connor and Koepke properties on North School Road would be as indicated on an A-2 survey dated December 15,1990. (Ex.1, pp.55,56, ex.24)

Defendant Koepke did not apply for a new zoning permit after modifying his boundary lines. (Ex.1, p.56) Instead, he again attempted to obtain a certificate of occupancy. In a letter dated April 18, 1991 (Ex.4, p.24, ex.17), copied to both defendants Lewis and Elsesser (Ex.4, p.25) Town Attorney Schwebel wrote:

> "Did Mr. Koepke alter a nonconforming lot by reducing the frontage even further? In the event that he has conveyed a portion of his lot to make it even more nonconforming than it was originally, then we cannot issue a certificate of occupancy because he has done something in violation of the Zoning Regulations and he would have to obtain a variance in order to do that."

Defendants Lewis and Elsesser were also both copied on a letter from Town Attorney Schwebel dated May 6, 1991 (Ex.4, p.26, ex.19) (Ex.7, p.52, ex.42) in which Attorney Schwebel wrote:

> "[t]he information we have now clearly appears to indicate Mr. Koepke has altered his nonconforming lot, making it even more nonconforming and therefore making the lot in

violation of zoning without concern for the problems raised by the tower."

Expressly notified of the lack of a certificate of zoning compliance (Ex.4, P.26, ex.19) or certificate of occupancy, municipal defendants continued to use defendant Koepke's tower. (Ex.6, #2)

Oral argument before the Appellate Court in the matter of Koepke v. ZBA was on May 31, 1991. In a decision released August 27, 1991 (25 Conn. App. 611) the Connecticut Appellate Court affirmed the decision of the trial court on the issue of the sufficiency of the legal notice. Defendant Elsesser was notified by Town Attorney Schwebel of the Appellate Court decision by letter dated August 28, 1991. (Ex.41) By letters dated September 9, 1991, (Ex.42), October 18, 1991, (Ex.43) and November 11, 1991 (Ex.44) municipal defendants were also notified by Town Attorney Schwebel that the Oygards had petitioned the Connecticut Supreme Court for certification. Oygards' petition was granted on November 13, 1991. (Ex.45)

In November 1991 defendant Ashley was elected to the position of Chairman of the Coventry Town Council, a position he would continue to hold through October 16, 1995 when plaintiffs filed their complaint in the case at bar. (Ex.46, #2) Defendant Lewis had been Town Council Chairman from November 1985 until November 1991 and continued to be a member of the Coventry Town Council for two more years until November 1993. (Ex.13, #2) As is customary after an election, Town Attorney Schwebel briefed the new council on all pending litigation. (Ex.47, p.7)

By Motion dated January 7, 1992 defendant Koepke moved to stay proceedings in Koepke v. Town of Coventry, - his suit for monetary damages that was still pending in the Superior Court in the Judicial District of Tolland at Rockville, - which motion was granted.(Ex.48)

Oral argument before the Connecticut Supreme Court in the matter of Koepke v. ZBA was held June 5, 1992 and, in an opinion released July 28, 1992, (223 Conn. 171), the Connecticut Supreme Court held that the legal notice published by the ZBA was jurisdictionally defective, but reversed the decision of the Appellate Court because "sound public policy requires a remand to the board to enable it to complete its proceedings in proper fashion". Id. p. 179 The case was remanded to the Appellate Court for its consideration of the issue of the timeliness of Oygard's appeal to the ZBA. By letter dated August 31, 1992 Town Attorney Schwebel advised defendants Elsesser and Ashley of the Supreme Court decision and concluded "About all I can say to you at this point is that this case is far from over." (Ex.47, p.8, ex.1) (Ex.4, p.26, ex.20)

On remand, the Appellate Court heard oral argument November 6, 1992 and in a decision released February 23, 1993, (30 Conn. App. 395), the Appellate Court again affirmed the decision of the trial court, holding that the Oygard Appeal to the ZBA was untimely. The Willimantic Chronicle published an article dated March 2, 1993 (Ex.47, ex.3) on the latest Appellate Court decision. Defendant Koepke, through his attorney, warned plaintiff Susan Oygard that if she petitioned the Supreme Court again he would would sue her for vexatious litigation.

By letters dated April 27, 1993 (Ex.49), May 14, 1993, (Ex.50) and June 23, 1993 (Ex.51) defendants Elsesser and Ashley were advised by Town Attorney Schwebel that the Oygards had again petitioned the Connecticut Supreme Court for certification and that the Oygard petition had been granted. (See Ex.47,ex.2)

On November 1, 1993 defendant Koepke signed a five year contract to lease antenna space on his North School Road tower to Connecticut Mobilecom for $461.89 per month. (Ex.52). Four months later, on March 22, 1994, he would tell the Connecticut Supreme Court that he "[never]

instituted any proceeding to enforce or carry out the judgment of the trial court as Oygard alleges." (Ex.53)

After the November 1993 election, in which defendant Ashley was re-elected, Town Attorney Schwebel telephoned Oygard's attorney Mark Branse to 'brainstorm' about the ramifications of the pending Supreme Court decision. Mark Branse made a record of that telephone conversation, which he forwarded to Susan Oygard for comment.(Ex.54) As recorded in Mark Branse's notes, Town Attorney Schwebel said the "Town's position now is that the best that could happen is that this appeal would go away so they can use the tower in peace..." The Town Attorney's other client, the ZBA, had supported and adopted "all issues set forth by appellant Susan Oygard" (Ex.55) See also Statement of Coventry Zoning Board of Appeals in support of Motion to Strike. (Ex.56)

In February of 1994, prior to the oral argument before the Connecticut Supreme Court, plaintiff Susan Oygard telephoned Defendant Ashley and urged him to seek legal advice about the Town's use of the tower. Defendant Ashley does not remember the phone conversation. (Ex.47, pp.7-9)

Oral argument before the Supreme Court was held March 31, 1994. The Willimantic Chronicle published an article about it the following day. (Ex.57) Shortly thereafter defendant Koepke telephoned plaintiff Susan Oygard and stated that he would turn his property into a cemetary for the Oygards if he couldn't keep his tower there.

Meanwhile, Coventry Local Government and Police Department FCC Radio Station licenses for transmitter locations at 200 North School Road, due to expire in July of 1994, were renewed for another five years effective May 17, 1994 (Ex.58) and May 4, 1994 respectively. (Ex.59)

On August 2, 1994 the Connecticut Supreme Court rendered a final decision in the administrative appeal that had been filed eight years earlier. The Supreme Court concluded that Oygard's appeal to the ZBA was timely and

"consequently,that there was no defect, subject matter or otherwise, in the board's authority to hear her appeal." Koepke v. Zoning Board of Appeals 230 Conn. 452, 456 (1994) The Court accordingly reversed the judgment of the Appellate Court and directed that the case be remanded to the ZBA for a new hearing. Id. p. 459 Newspaper accounts of the Supreme Court decision were published in the Willimantic Chronicle on August 2, 1994 (Ex.47, ex.4) and the Hartford Courant on August 3, 1994 (Ex.47, ex.5) Since 1989, plaintiffs Norvald and Susan Oygard had incurred $67,000 in legal expenses for the opportunity to be heard at a duly noticed ZBA hearing[9].
(See Ex.60-65)

By letter dated December 10, 1994 plaintiff Susan Oygard urged the Town Council to take steps to resolve the matter. (Ex.46, #8) When no response was received, plaintiff Susan Oygard telephoned defendant Ashley to discuss the issues raised in her letter. (Ex.47, p.9) Defendant Ashley and the Town Council did not respond. By letter dated January 27, 1995 from Carole Miller to Richard Ashley (Ex.47, p.9, ex.6) defendant Ashley was again urged to address the matter of the North School Road tower. He never responded. (Ex.47, p9-10) When asked if he ever requested any opinion at all from the Town Attorney about the legality of using Mr. Koepke's tower, defendant Ashley replied "I don't recall any request." (Ex.47, pp.7-8) Finally, by letter dated March 9, 1995 plaintiffs Norvald and Susan Oygard advised the Town Council of their intention to commence the present action. (Complaint Exhibit A) Plaintiffs notice of intent to sue was reported in the

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[9]Although Oygards were fully liable for the legal bills incurred, half of the total amount paid through December 1995 was contributed by the O'Connors.

Willimantic Chronicle (Ex.66), the Hartford Courant (Ex.67) and the Journal Inquirer (Ex.68)

The case of Koepke v. Town of Coventry - Koepke's suit for monetary damages that had been filed in May of 1988 - was *still* pending in Tolland County Superior Court. By letter dated January 10, 1995 Town Attorney Schwebel advised defendants Elsesser and Ashley that the case had been continued one more time.(Ex.69)[10]

By order dated January 23, 1995, the Superior Court for the Judicial District of Tolland at Rockville remanded the Oygard appeal to the ZBA in compliance with the order of the Connecticut Supreme Court. By letter dated January 31, 1995 Town Attorney Schwebel advised defendants Elsesser and Ashley of the remand, and turned the matter over to the new Town Attorney Michael Zizka[11]. (Ex.71)

Finally, on April 18, 1995 the ZBA held a public hearing on the Oygard appeal. Plaintiff Susan Oygard submitted a 36 page Statement (Ex.72); defendant Koepke also submitted a lengthy document. At least five lawyers, three of them representing defendant Koepke, were present.

Coventry Chief of Police Frank Trzaskos wrote a letter in support of defendant Koepke that was submitted to the board in which he wrote (Ex.73):

> I am writing this letter in support of the Koepke Radio tower on North School Road. The

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[10]Eventually, after plaintiffs commenced the instant action, Koepke v. Town of Coventry would be the conduit through which municipal defendants would funnel certain benefits to defendant Koepke as part of a 'settlement' reached in executive session.

[11]The Town Council had changed Town Attorneys in April 1994. (See Ex.67)

> Coventry Police Department does not use the radio tower at this time. We use an antenna located on the top of the Town Hall. This is the only antenna that we have available for use."

The Coventry Police Department however was using defendant Koepke's tower. See Ex.59, and Ex.6,#5.

Robert Fairbairn, former radio consultant for the Town of Coventry, with whom defendant Koepke had been acquainted since 1976, (Ex.1, p.45) also submitted a letter on behalf of defendant Koepke (Ex.1, ex.20):

> Radio Communications Associates has previously represented the Town of Coventry on this matter in 1990 and concluded that the relocation of this telecommunications facility was not feasible.

Neither defendants Lewis, Ashley, Elsesser or Koepke agree with Mr. Fairbairn's conclusion, even though Robert Fairbairn was the only radio consultant hired by the Town to provide expert opinion on relocating the Koepke tower. (Ex.46.#6) (Ex.27, #6) (Ex.13 #6) (Ex.1, pp.47-48)

Jonathan Kriesberg spoke in support of the Oygard appeal: (Ex.39, p.30-31)

> He went ahead and he put up that tower and he has now profited from that tower for nine years. And to me it is the most blatant disregard for the rule of law. I'm also an attorney. I deal with .. law violators all the time and frankly I have never seen any one with as much chutzpah to violate the law as Mr. Koepke.

Judy LeDoyt also supported the Oygard appeal. (Ex.39, p.33):

> I have lived in this town for 48 years and I have never seen anything so blatantly violated as what Mr. Koepke has done. ....

The public hearing was closed at midnight and the board put off deliberations until the next regularly scheduled meeting. The Willimantic Chronicle publish an account of the ZBA hearing the following day. (Ex.74)

On May 16, 1995 the ZBA began its deliberations guided by Town Attorney Michael Zizka whose client the Town was using defendant Koepke's tower. At the May 16, 1995 meeting the ZBA decided that the zone was in fact RU-40 but put off a final decision to a special meeting scheduled for June 6, 1995. The Hartford Courant published an article about the board's deliberations on May 17, 1995. (Ex.4, ex.21)

On June 6, 1995 the board continued its deliberations. That night the ZBA voted unanimously to sustain the appeal of Susan Oygard. Accounts of the ZBA decision were published in the Hartford Courant, (Ex.4, ex.22), the Willimantic Chronicle (Ex.75) and the Journal Inquirer. (Ex.4, ex.23)

The Journal Inquirer article, published on June 7, 1995, (Ex.4, ex.23), reported that town attorney Michael Zizka intended to advise Coventry Zoning Enforcement Officer to refrain from interfering with the tower's operation and to take no action against Koepke while Koepke's appeal - which had yet to be filed - was pending.

On June 19, 1995 defendant Koepke filed an administrative appeal of the ZBA decision, hereinafter Koepke v. ZBA II, again naming plaintiff Susan Oygard as a defendant, (Ex.1, ex.26) Town Attorney, Michael Zizka, filed an appearance on behalf of the ZBA. (Ex.76) In Koepke v. ZBA II defendant Koepke claimed *inter alia* that the board had no jurisdiction to act because the Oygard appeal to the board was untimely, and the zoning

enforcement officer did not have the authority to revoke his first zoning permit, - both issues that had been subjected to three levels of judicial scrutiny over a period of eight years, and decided by the Connecticut Supreme Court only ten months earlier.

The Hartford Courant on June 20, 1995 reported that Koepke had taken the matter back to court. (Ex. 77) In the June 20, 1995 article, it was also reported that defendant Koepke met with defendant Elsesser and proposed moving the tower onto town land. Town Council Chairman Ashley reportedly said "the idea might be worthy of consideration - after the courts render a decision".

In the meantime, the courts would again hear arguments about the timeliness of Oygard's appeal to the board, (Ex.78, pp.9-11) defendant Koepke would continue to operate his tower, municipal defendants would continue to use it for free, see Ex.79, Ex.80, and Ex.90, and the town attorney, whose client the Town had eight transmitters in operation on Koepke's tower, (Ex.6, #4) would represent the ZBA in Koepke v. ZBA II.

On October 16, 1995, plaintiffs filed their complaint in the case at bar.

PLAINTIFFS,

NORVALD OYGARD

s/ Norvald Oygard

Norvald Oygard, Plaintiff
235 North School Rd.
P.O. Box 62
Coventry, CT 06238
860-742-5209

SUSAN OYGARD

s/Susan Oygard

Susan Oygard, Plaintiff
235 North School Rd.
P.O. Box 62
Coventry, CT 06238
860-742-5209

APPENDIX A

MATERIAL FACTS FOR WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

1. In June of 1986 defendant Koepke offered free use of a radio tower he proposed to build on North School Road, to certain Coventry officials.

2. On August 7, 1986 the zoning enforcement officer of Coventry issued a zoning permit to defendant Koepke to construct a radio tower on his property on North School Road in Coventry.

3. "On August 12, 1986, [Susan] Oygard appealed to the [Zoning] board [of Appeals] challenging the validity of the August 7, 1986 permit on the grounds that its issuance adversely affected her property and that the radio tower was not permitted by the applicable zoning regulations" Koepke v. Zoning Board of Appeals 230 Conn. 452, 454 (1994)

4. On August 12, 1986 defendant Koepke's radio tower did not exist.

5. Defendant Koepke constructed the radio tower after August 12, 1986.

6. Plaintiffs were injured in their business or property as a result of the actions of one or more of the defendants.

7. "After a public hearing the board voted to sustain [Susan] Oygard's appeal and revoked the permit that had been issued to [defendant Koepke] on August 7,

1986." Koepke v. Zoning Board of Appeals 230 Conn. 452, 454 (1994)

8. Defendant Koepke filed an administrative appeal of the board's decision on October 2, 1986.

9. Defendant Koepke installed power at his tower on October 3, 1986, and thereafter commenced operation of the tower.

10. Municipal defendants used defendant Koepke's tower for free while the administrative appeal of the board's decision was pending.

11. There was never a certificate of zoning compliance or certificate of occupancy issued for defendant Koepke's tower.

12. Municipal defendants did not enforce the zoning regulations against defendant Koepke.

13. Municipal defendants authorized the town attorney to take legal action to enforce the zoning regulations against other property owners in Coventry.

14. The Town of Coventry affects interstate commerce.

15. Municipal defendants never sought legal advice about the legality of using defendant Koepke's tower.

APPENDIX B

TABLE OF EXHIBITS

1. Koepke Deposition dated January 27, 1997

2. Certified Appraisal dated June 14, 1996

3. Isner testimony before Judge Vasington dated May 9, 1989 pgs. 1,2,30,31

4. Elsesser Deposition dated January 29, 1997

5. Survey of Jacquemine property on North School Road

6. Koepke Responses to Interrogatories dated July 10, 1996

7. Lewis Deposition dated January 29, 1997

8. Koepke Responses to Interrogatories dated May 22, 1996

9. Koepke testimony to ZBA September 16, 1986 pgs. 1,25,26

10 Northeast Utilities Meter Installation Record

11. Northeast Utilities records for Unit A at 200 North School Road

12. Coventry Town Council Responses to Interrogatories dated Jan. 3, 1997

13. Lewis Responses to Interrogatories dated Jan. 3, 1997

14. Tedford Subdivision Advertisement

15. Map depicting relative location of Oygard property and Tedford subdivision

16. Lot prices in Tedford subdivision

17. Description of Lot #9 in Tedford subdivision

18. FCC licence (Reference copy) for Tolland County Mutual Aid dated January 28, 1987

19. FCC licence renewal (Reference copy) for Tolland County Mutual Aid dated Nov. 8, 1991

20. FCC licence renewal (Reference copy) for Tolland County Mutual Aid dated Nov. 12, 1996

21. Coventry Town Council Meeting Minutes dated May 28, 1987

22. Coventry Town Council Meeting Minutes dated June 1, 1987 pgs. 1,5

23. Records of Telephone Conversation with SNET representative Sept. 1987

24. Page from Telephone Book

25. Coventry Town Council Meeting Minutes dated October 5, 1987

26. Letter dated April 11, 1988 from Mark Branse to Susan Oygard

27. Elsesser Responses to Interrogatories dated January 3, 1997

28. Charter, Town of Coventry

29. Oygard testimony before Judge Vasington dated July 13, 1989, first page

30. Letter dated August 24, 1989 from Mark Branse to Abbot Schwebel

31. Letter dated October 10, 1989 from Mark Branse to Abbot Schwebel

32. Oygard Legal bills accrued through October 1989

33. Coventry Town Council Meeting Minutes dated October 10, 1989

34. Petition for Certification dated October 16, 1989, first page

35. Letter dated October 16, 1989 from Mark Branse to John Elsesser

36. Northeast Utilities Meter Installation Record

37. Northeast Utilities records for Town Manager's Office, 200 North School Rd.

38. Willimantic Chronicle article dated December 11, 1989

39. Transcript of ZBA hearing April 18, 1995 pgs 1,27-33

40. Boundary line agreement dated March 28, 1991

41. Letter dated August 28, 1991 from Abbot Schwebel to John Elsesser

42. Letter dated September 9, 1991 from Abbot Schwebel to Michael Gustafson

43. Letter dated October 18, 1991 from Abbot Schwebel to John Elsesser

44. Letter dated November 11, 1991 from Abbot Schwebel to John Elsesser

45. Corrected Order on Petition for Certification dated Nov.13, 1991

46. Ashley Responses to Interrogarories dated January 22, 1997

47. Ashley Deposition dated January 29, 1997

48. Motion to Stay dated January 7, 1992

49. Letter dated April 27, 1993 from Abbot Schwebel to John Elsesser

50. Letter dated May 14, 1993 from Abbot Schwebel to John Elsesser

51. Letter dated June 23, 1993 from Abbot Schwebel to John Elsesser

52. Lease of Site for Communications Facilites signed Nov. 1, 1993

53. Objection to Motion for Recovery of Legal Expenses and Costs (Misdated March 22,1993, Actual date March 22, 1994, see certification page.)

54. Record of 11-10-93 telephone conversation between Mark Branse and Abbot Schwebel

55. Statement of Defendant Coventry Zoning Board of Appeals dated Jan. 10, 1990

56. Statement of Defendant Coventry Zoning Board of Appeals dated Jan. 22, 1991 w/attachments

57. Willimantic Chronicle article dated April 1, 1994

58. FCC Radio Station License (Reference copy) issued to Coventry, Town of, issue date May 17, 1994

59. FCC Radio Station License (Reference copy) issued to Coventry Police Dept, issue date May 4, 1994

60. Oygard legal bills incurred in 1990

61. Oygard legal bills incurred in 1991

62. Oygard legal bills incurred in 1992

63. Oygard legal bills incurred in 1993

64. Oygard legal bills incurred in 1994

65. Oygard legal bills incurred in 1995

66. Willimantic Chronicle article dated March 18, 1995

67. Hartford Courant article (undated)

68. Journal Inquirer article dated March 25, 1995

69. Letter dated Jan. 10, 1995 from Abbot Schwebel to John Elsesser

70. Willimantic Chronicle article dated April 21, 1994

71. Letter w/enclosure dated Jan. 31, 1995 from Abbot Schwebel to John Elsesser

72. Statement of Susan Oygard to Coventry ZBA dated April 18, 1995

73. Letter dated Apr. 4, 1995 from Coventry Police Chief Frank Trzaskos

74. Willimantic Chronicle article dated April 19, 1995

75. Willimantic Chronicle article dated June 7, 1995

76. Appearance, Michael Zizka, Esq.

77. Hartford Courant article dated June 20, 1995

78. Brief of Defendant Susan Oygard dated March 29, 1996

79. Utility bills, Alan Koepke 200 North School Rd., May 15, 1995 through October 13, 1995

80. Utility bills, Town Manager's Office, 200 North School Rd. May 15, 1995 through Nov. 14, 1995

81. Purchase orders signed by John Elsesser for utility bills for North School Road tower. May-Nov. 1995

82. Connecticut General Statutes § 8-7

83. P.A. 77-509 § 6

84. Proposed House Bill 6208

85. Proposed Senate Bill 597

86. Legislative History, House Bill 6208 and Senate Bill 597

87. Committee Bill. No. 6288, pgs. 1,15,16

88. Substitute House Bill No. 6288 pgs.1,7,8,9

89. Substitute House Bill No. 6288 as amended by House Amendment Schedules "A" and "C" pgs.1,7,8,9

90. H-189 Com. Gen. Assy. House Proceedings (1977) Vol. 20, Part 8, pgs. 3047-3052

91. Connecticut General Statutes § 8-8

92. Connecticut General Statutes § 8-8 (1986 version)

93. Rules of Appellate Procedure § 4046

94. Status of Appearances as of 7/25/95 Koepke v. ZBA II Docket # 95,0058273S

95. FCC Radio Station License (Reference copy) issued Colchester Emergency Communications, issue date May 17, 1993

96. Letter dated August 23, 1988 from Dean LeDour, Corporate Dev. Manager, American Paging Co. to Alan Koepke

97. Commission Comment to Part XI. BRIBERY OFFENSES AGAINST THE ADMINISTRATION OF JUSTICE AND OTHER RELATED OFFENSES

98. P.A. 80-479

99. House Bill 5580, Legislative History

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SUSAN C. OYGARD NORVALD OYGARD	:	CIVIL ACTION NO. 3:95 CV 02486 DJS
v.	:	
TOWN OF COVENTRY, COVENTRY TOWN COUNCIL, JOHN ELSESSER, JOAN LEWIS ALAN J. KOEPKE, and RICHARD A. ASHLEY	:	MARCH 31, 1997

MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

COUNT ONE: 42 U.S.C. § 1983

1. Defendants willfully or recklessly conspired to violate plaintiffs' constitutional rights to due process under Connecticut General Statutes § 8-7 and § 8-8.

i) Violations of C.G.S. § 8-7 (Ex.82):

On August 12, 1986, before any construction commenced, and pursuant to Connecticut General Statutes § 8-7, plaintiffs appealed the decision of the zoning enforcement officer to issue a zoning permit to defendant Koepke for a commercial radio tower. The zoning enforcement officer immediately notified defendant Koepke

of the appeal by telephone and thereafter by certified letter, and advised him that a public hearing had been scheduled for September 16, 1986. (See Statement of Facts pg.5)

The effect of plaintiffs' appeal, pursuant to Conn. Gen. Stats. § 8-7, was to impose a stay of all proceedings, including construction and use, until the plaintiffs had the opportunity to be heard by the Zoning Board of Appeals. C.G.S. § 8-7 provides in relevant part:

> An appeal shall not stay any such order, requirement or decision which prohibits further construction or expansion of a use in violation of such zoning regulations except to such extent that the board grants a stay thereof. An appeal from any other order, requirement or decision *shall stay all proceedings in the action appealed from .. (emphasis added)*

Contrary to the assertion of municipal defendants in their Reply Memorandum dated Dec. 6, 1996, that 'stay of all proceedings in the action appealed from' means 'proceed at your own risk', the plain language, the statutory purpose and the legislative history of the statute all point to a clear legislative intent that 'stay of all proceedings in the action appealed from' means a stay of all proceedings, including construction and/or use, until the board has had the opportunity to review the matter under appeal.

Prior to 1977, the statute did not distinguish between orders, requirements or decisions of the zoning enforcement officer that were prohibitive in nature and those that were permissive in nature. Before the legislature enacted Public Act 77-509, the statute in relevant part simply said in "An appeal shall stay all proceedings in the action appealed from ..." The 1961 superior court decision State v. Magnota 23 Conn. Supp. 124, 177 A.2d 515 (1961), cited by municipal defendants in their reply memorandum dated Dec. 6, 1996,

construed the pre-1977 language to mean that a legal proceeding to enforce a cease and desist order was stayed while an appeal of the cease and desist order was pending.

In 1977, partly in response to State v. Magnota, the legislature enacted Public Act 77-509 'AN ACT CONCERNING ZONING REGULATIONS, HEARINGS AND APPEALS.' P.A. 77-509 § 6 (Ex.83) amended the 'stay' language of C.G.S. § 8-7 to distinguish between actions of the zoning enforcement officer that were prohibitive in nature (such as the issuance of stop work orders) and those that were permissive in nature (such as the issuance of permits). The statutory purpose in amending the language of the statute was expressly stated in Proposed House Bill 6208[1], (Ex.84), which was enacted as P.A. 77-509 § 6:

> STATEMENT OF PURPOSE: Since the word proceedings has been interpreted to mean only legal proceedings, this amendment extends the stay [to] any work or use on the land regarding which the appeal has been taken.

Senate Bill No. 597, (Ex.85), which was identical in substance to House Bill 6208, was entitled AN ACT CONCERNING THE STAYING OF CONSTRUCTION PENDING A ZONING APPEAL.

The legislative history of P.A. 77-508 § 6 reveals that the legislature debated and expressly rejected, the 'proceed at

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[1]House Bill 6208 and Senate Bill 597 (See legislative history Ex.86) and several other bills relating to zoning regulations, hearings, and appeals were combined in one package as Committee Bill 6288, (Ex.87). Substitute House Bill 6288 (Ex.88) with Amendments A and C (Ex.89) was enacted as P.A. 77-509.

your own risk while an appeal is pending' approach. Rep. Dodes of the 88th district was in favor of the the 'proceed at your own risk' approach. He introduced 'House Amendment B' (Ex.90) to Substitute House Bill 6288 that would have restored the original language of the statute. Rep. Allyn of the 43rd district opposed 'House Amendment B' arguing:

> [o]ne of the things that concerns me are the fact that if a builder can go ahead and complete his structure even though it may be illegal, then when it comes time to make a final decision on it, many times those people be will be swayed by the fact that he's already got his building built and they'll sort of say, oh well, he's already got his building built and it will really be a hardship for us to make him tear it down, so therefore, we'll give him the permit. ... And I think with this amendment the same thing is possible within your planning and zoning regulations. Somebody can just go ahead and do it knowing that they're not in compliance assuming the fact that they'll be approved eventually anyway. So, I oppose the amendment.

House of Rep. Legis. Hist. P.A. 509 pgs. 3048-3051 May 10, 1977.

'House Amendment B' failed by a vote of 127 to 15.

Arguments presented by the defendants in their 12(b)(6) motions, and in the administrative appeals filed by defendant Koepke, indicate that the 'proceed at your own risk then plead hardship' end run around the zoning regulations - in direct violation of C.G.S. § 8-7 - is exactly what the defendants intended to do.

ii) Violations of C.G.S. § 8-8 (Ex.91):

On September 16, 1986 the ZBA voted to sustain the appeal of plaintiff Susan Oygard and revoked the zoning permit that had been issued to defendant Koepke on August 7, 1986. On October 2, 1986 pursuant to C.G.S. § 8-8 defendant Koepke filed an administrative appeal of the ZBA decision. Under C.G.S. § 8-8(g), Koepke's administrative appeal did **not** automatically stay the revocation of defendant Koepke's zoning permit.
C.G.S. § 8-8(g) (formerly § 8-8(b) Ex.92) provides:

> The appeal shall state the reasons on which it has been predicated and shall not stay proceedings on the decision appealed from.

Defendant Koepke clearly understood that he needed a restraining order to proceed with construction and use. He applied to the courts three times for a restraining order and/or an injunction - without success. The Oygards were denied the benefit of the board's decision in their favor as defendant Koepke, without court authority, continued construction and commenced operation of his tower while his administrative appeal was pending - in direct violation of C.G.S. § 8-8.

In their reply memorandum dated December 6, 1996 (page 2) municipal defendants assert:

> "[The plaintiffs'] claim to a constitutional "property interest" in how their neighbor, Alan Koepke, used <u>his</u> land rests on a series of misleading, gossamer rhetorical threads, unsupported by even a single court decision involving similar facts. No case has held that an administrative agency's decision regarding one

> person's land creates a "property interest" for neighbors, especially when the landowner has exercised his right to appeal the decision."

Municipal defendants are misinformed. In Fong v. Zoning Board of Appeals of the Town of Greenwich 212 Conn. 628, 563 A.2d 293 (1989), a case involving similar facts, a neighbor appealed the decision of the building inspector to issue a building permit to the owner of an abutting commercial property. The Greenwich planning and zoning board of appeals sustained the appeal of the neighbor and revoked the building permit that had been issued to the owner of the commercial property. In holding that the neighbor, Pettengill, was an indispensable party to an appeal of the board's decision, the Court stated:

> Pettengill was not merely an abutter, however, but the person who initiated before the board the very proceeding that has resulted in the present appeal. Unlike other abutters or aggrieved members of the public, whose interests may be regarded as adequately represented by the board itself, he had become a party to the administrative proceeding. If he had not prevailed before the board, he could have appealed from its decision. Having been successful, Pettengill acquired a special interest in the subject matter of any appeal resulting from the proceeding that might deprive him of the benefit of its outcome before the board in his favor. *We consider this benefit to be equivalent to the "right" granted by a zoning board to a landowner to use his property in a certain manner.* (*emphasis added*)

Id. p. 633-634

On September 26, 1989 the trial court, (Vasington, J.), rendered a decision in Koepke's favor in the administrative appeal Koepke v. ZBA. On October 16, 1989, plaintiffs petitioned the appellate court for review of the trial court decision. Pursuant C.G.S. § 8-8(o) (formerly § 8-8(g) Ex.92) the procedures on appeal to the Appellate Court are specified by the Connecticut Rules of Court for appeal of judgments rendered by the superior court. C.G.S. § 8-8(o) provides in relevant part:

> The procedure on appeal to the appellate court shall, except as otherwise provided herein, be in accordance with the procedures provided by rule or law for the appeal of judgments rendered by the superior court..

Pursuant to the Connecticut Rules of Court § 4046, (Ex.93) the trial court decision was automatically stayed when plaintiffs' appealed the decision to the appellate court.

The automatic stay pursuant to § 4046 did not vacate the judgment of the trial court, but it denied defendant Koepke "the immediate fruits of his .. victory". Aetna v. Priesner 203 Conn. 407, 414, 525 A.2d 83,88 In fact the trial court judgment was only a temporary victory for defendant Koepke. It never had operative effect. Koepke never even filed a motion to terminate the automatic stay, and on August 2, 1994, the Connecticut Supreme Court rendered a final judgment, Koepke v. Zoning Board of Appeals 230 Conn. 452 (1994), reversing the decision of the trial court and directing that the matter be remanded to the Coventry Zoning Board of Appeals for a new hearing. The only *operative* judgment was the final judgment of the Connecticut Supreme Court. Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc. v. Planning & Zoning Commission 220 Conn. 527, 542 (1991)

Defendant Koepke, however, was not denied the "immediate fruits of his victory", temporary victory though it was. Municipal defendants encouraged him to violate the stay even as settlement discussions were being held. It was plaintiffs who were denied the benefit of the automatic stay - a benefit to which they had a legitimate claim of entitlement as appellants under C.G.S. § 8-8(o).

On June 6, 1995, when on remand, the Coventry Zoning Board of Appeals again sustained plaintiff Susan Oygard's appeal, defendant Koepke and municipal defendants, acting in concert, again denied the plaintiffs the benefit of the board decision in their favor as they blocked enforcement of the ZBA decision.

On June 19, 1995, defendant Koepke filed Koepke v. ZBA II, again naming plaintiff Susan Oygard as a defendant pursuant to C.G.S. § 8-8(f). Service of legal process was also made to the clerk of the municipality pursuant to C.G.S. § 8-8(e). (Ex.1 ex.26) Service of process to the clerk of the municipality is a jurisdictional requirement, but a municipality is not an indispensable party to the maintenance of the appeal. Simko v. Zoning Board of Appeals of Town of Fairfield 206 Conn. 374, 386 n.1, 538 A.2d 202 (1988) If, however, the interests of the municipality will be affected by the judgment rendered, the municipality may move to be made a party for all purposes to the maintenance of the appeal. Id.

As indicated in their 12(b)(6) Motion dated November 11, 1986, on pages 22 and 23, municipal defendants understood that non-zoning officials are "legally entitled to take positions that differed from those of the Town's zoning officials."

Municipal defendants also understood that if they moved to be made a party to Koepke v. ZBA II, taking a position that differed from that of the ZBA, the court would require separate attorneys to represent the different interests of the Town and the ZBA, and an unfettered ZBA might

attack them for blatantly disregarding its decision, as the civil service commission in Waterbury had attacked Waterbury officials for "blatant disregard of the civil service list". See Gesmonde, Pietrosimone,Sgrinari, Pinkus & Sachs v. City of Waterbury,231 Conn. 745, 754 (1995)

In Koepke v. ZBA II the Town of Coventry did not move to be made a party for all purposes to the maintenance of the appeal. Instead, the Town of Coventry was a 'no appearance' party (Ex.94), the town attorney filed an appearance on behalf of the ZBA, and municipal defendants continued to use defendant Koepke's tower for free, in direct violation of C.G.S. § 8-8, deliberately subverting plaintiffs' constitutional rights to due process as successful appellants to the ZBA.

2. Defendants willfully or recklessly conspired to violate plaintiffs' constitutional rights to equal protection.

The first inquiry in an analysis of constitutional rights to equal protection is whether the course of conduct complained of involves state action or state inaction. When, as here, the state becomes entangled with a private entity, when it approves, encourages, and facilitates private unlawful conduct, state action rather than inaction is implicated. A conspiracy between municipal defendants and defendant Koepke to construct and operate a commercial radio tower in a residential zone in violation the Coventry Zoning Regulations and the Connecticut General Statutes constitutes invidious state action denying plaintiffs the equal protection of the law.

> The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were

> officially authorized, or lawful; (citations ommitted)

Adickes v. S. H. Kress & Co. 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)

In the case at bar, the state's involvement is immediately obvious. Municipal defendants admit they were using defendant Koepke's tower for free. Municipal defendants knowingly encouraged, participated in, and financially benefited from, defendant Koepke's unlawful activities. .

In their 12(b)(6) Motions, dated November 4, 1996 and November 11, 1996 defendants assert that the issue here is state inaction, i.e., that municipal defendants merely exercised their discretion not to enforce the law, citing cases such as Heckler v. Chaney 470 U.S. 821, 831, 105 S.Ct. 1649,1655, 84 L.Ed.2d 714 (1985) for the proposition that "government officials ... generally are given broad discretion in their decisions whether to undertake enforcement actions." Even where state inaction is at issue, the discretion of government officials not to enforce the zoning regulations does not extend to accepting benefits from zoning violators in return for nonenforcement decisions. See Justice Brennen's concurring opinion in Heckler v. Chaney:

> ... [T]he Court properly does not decide today that nonenforcement decisions are unreviewable in cases where .... [such decisions are] made for entirely illegitimate reasons, for example, nonenforcement in return for a bribe, judicial review of which would not be forclosed by the nonreviewability presumption ...

3. Defendants intentionally inflicted emotional distress on plaintiffs in furtherance of their conspiracy to violate plaintiffs' constitutional rights.

Intentional infliction of emotional distress is established upon a showing that:

> (1) the actor intended to inflict emotional distress; or that he knew or should have known that emotional distress was a likely result of his conduct; (2) that the conduct was extreme or outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe ...

DeLaurentis v. New Haven, 220 Conn. 225, 266-67 (1991)

Obstructing justice by deliberately misleading the court is outrageous conduct likely to cause emotional distress to one's opponents in a lawsuit. Defendant Koepke told the court that as a result of the issuance of the stop work order he "terminated all futher construction on the site"[2] and that he never "instituted any proceeding to enforce and carry out the judgment of the trial court as Oygard alleges"[3] and that the agents, officials, boards and commissions of the Town of Coventry prevented him "from completing and operating his communications tower, thereby causing him great harm"[4].

In fact, defendant Koepke continued working on the tower after the stop work order was issued. He instituted

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[2] See Ex. 1, ex.12, ¶ 30

[3] See Exhibit 53

[4] Ex.1, ex. 12, THIRD COUNT ¶ 34

several proceedings to enforce and carry out the judgment of the trial court, including installing a second utility meter on the tower, twice attempting to obtain a certificate of occupancy, applying for a varience, and signing a contract with Connecticut Mobilcom to lease antenna space on the tower. Nobody prevented him from completing and operating his communications tower, least of all the agents, officials, boards and commissions of the Town of Coventry who were using it themselves.

It is outrageous that defendants were so indifferent to plaintiffs constitutional rights that they never even questioned the town attorney, either verbally or in writing, about the legality of using the tower, even after being expressly notified by the town attorney that the tower violated the Coventry Zoning Regulations[5]. See Ex.13, Ex.27, and Ex.46, Interrogatory #5

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[5]See Deposition of Defendant Lewis pages 14 and 52:
Q. Are you an attorney?
A. No, I am not. I'm a paralegal.
Q. At any time, from August of 1986 until November of 1993 ... did you personally ever ask the Town Attorney about the legality of the Town's use of Mr. Keopke's radio tower?
A. I can't remember. I think the Council looked upon this as an ongoing litigation that would be handled by the courts.

See Deposition of Defendant Elsesser page 15:
Q. Are you familiar with the Connecticut Rules of Appellate Procedure?
A. I would have to say only peripherally.
Q. Are you an attorney?
A. No, I am not.
Q. You indicated that to the best of your knowledge no legal opinion on use was sought from a Town Attorney; is that correct?

Fostering a policy of intimidation and lawlessness is outrageous conduct likely to cause emotional distress. There are numerous, largely unproveable, ways (such as making anonymous phone calls to the school bus company to intercept a child's ride to school on court dates) to intimidate someone from going forward with a legal proceeding. To a litigant under such circumstances, there is an everpresent concern that a determined zoning violator, emboldened by the tacit support of the Town Council, will do something completely irrational if thwarted.

Deliberately undermining settlement discussions is outrageous conduct. Publicly, municipal defendants claimed they 'facilitated' settlement discussions. In reality they undermined settlement discussions completely, making it plain that - settlement or no settlement - Koepke could continue to violate the zoning regulations with impunity as long as he continued to give the Town free service. Settlement discussions were just meetings of co-conspirators[6], with plaintiffs participating as spectators deprived of all bargaining power.

A. That is correct.

See Deposition of defendant Ashley page 7:
Q. Did you ever request any opinion at all from the Town Attorney about the legality of using Mr. Koepke's tower?
A. I don't recall any request.

[6]See Exhibit 1 Koepke Deposition page 41:
Q. Isn't is true that the court ordered the parties in your administrative appeal to meet on March 6 of 1990 for the purpose of exploring settlement possibilities?
A. It is my understanding that this pre-argument conference that took place before Judge Dannehy in the Willimantic Courthouse was a matter that they have on all appellate cases that go before higher courts. They do this as a matter of

Judge Learned Hand said "[A]fter now some dozen years of experience I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death."[7] What is outrageous and even more dreadful is knowing that the outcome of the lawsuit is academic to small town officials, that it will be ignored, as municipal defendants and defendant Koepke ignored the decision of the Connecticut Supreme Court and the decision of the Coventry Zoning Board of Appeals. Plaintiffs' legal expenses - clearly forseeable economic damages - were incurred only for the opportunity to be heard at a duly noticed ZBA hearing. They were incurred for nothing when defendants acting in concert blatently disregarded the decision of the ZBA and prevented the decision of the ZBA from being enforced. Added to the very real emotional distress of being a litigant, was the severe distress caused by the realization that even if they prevailed in court, and even if the ZBA sustained their appeal on remand, the plaintiffs would have only a Phyrric victory unless they were prepared to incur more huge legal bills to enforce the decision of the ZBA.

Harrassing the plaintiffs with frivolous legal claims is outrageous conduct. Federal Judge Frank Easterbrook said "something is frivolous .. when .. we've decided the very point, and recently, against the person reasserting it"[8]. Less

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standard. I mean it has no particular significance to me.

[7]Hand, The Deficiencies of Trials to Reach the Heart of the Matter 3 A.B.C.N.Y. Lectures on Legal Topics 87 (1926)

[8]*Quoted in* Sanford Levinson, "Frivolous Cases: Do Lawyers Really Know Anything at All?" 24 Osgoode Hall L. Rev. 353, 375 (1987)

than a year after the Connecticut Supreme Court rendered a decision in Koepke v. ZBA 230 Conn. 452 (1994), holding that Oygard's appeal to the board was timely, the same plaintiff sued the same defendants on the same claim[9].

The sheer length of time over which such conduct occurred is a measure of the severity of emotional distress it caused. "Liability for intentional infliction of emotional distress requires conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause mental distress of a very serious kind..." DeLaurentis v. New Haven 220 Conn. 225, 226-267 (1991) The conduct of the defendants in the case at bar exceeded all bounds of decency and was especially calculated to cause, and did cause, severe mental distress for ten years.

COUNT TWO: TORTIOUS INTERFERENCE WITH CONTRACT

The contract at issue in the instant case is the "Resolution Authorizing Settlement of a Claim Against the Town of Coventry by Susan and Norvald Oygard", hereinafter the 'Resolution', (Exhibit B to plaintiffs' Amended Complaint dated October 30, 1996). In accordance with ¶ 2 of the Resolution, plaintiffs gave the

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[9]See Ex. 1 Koepke Deposition pages 62,63:

Q. And isn't it true that in your administrative appeal filed June 19,1995, you claim that the Board improperly refused to determine that Susan Oygard's appeal was not filed in a timely manner, and thus that the Board lacked jurisdiction to hear her appeal?

A. That was probably one of our...

Q. Arguments?

A. Arguments, yes.

Town a general release. (Exhibit D to Plaintiffs' Amended Complaint) The general release expressly states that it was given "For and in consideration of the sum of SEVEN THOUSAND FIVE HUNDRED and NO ONE-HUNDREDTHS ($7,500) DOLLARS, *and other good and valuable consideration...*" The 'other good and valuable consideration' is the promise by the Town to "take appropriate legal action against Mr. Koepke to seek removal of the radio tower..." in accordance with ¶ 3 of the Resolution[10].

Municipal defendants acknowledged in the Resolution that defendant Koepke's tower was illegal -

> WHEREAS, the town of Coventry issued a zoning permit for the erection of a radio tower on property of Alan Koepke on North school Road, *in violation of the Coventry Zoning Regulations*, ... (*emphasis added*)

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[10]In their counterclaim, municipal defendants do not identify or produce any written evidence that the terms of the contractual agreement between the Oygards and the Town are otherwise than as stated in the Resolution attached to Plaintiffs' Complaint as Exhibit B. Bare allegations by municipal defendants that the terms of the contract differ from those in the written Resolution carry little weight. Under the best evidence rule as stated by Wharton: "[I]f the primary evidence of a fact is a writing, that writing must be produced in evidence as the best evidence of that fact and ... secondary evidence may only be produced when the nonproduction of the primary writing is explained and excused." See Strong, Broun, & Mosteller, Evidence, Cases & Materials, Fifth Edition, West Publishing Co. St. Paul, Minn. (1995) p. 443

They acknowledged that the plaintiffs have a claim against the Town of Coventry -

> WHEREAS, Susan and Norvald Oygard have a claim against the Town of Coventry as a result of the *illegal issuance of the zoning permit* allowing construction ofthe tower, (*emphasis added*)

yet, acting outside the scope of their authority, they conspired with defendant Koepke to unlawfully use the tower, directly undermining ¶ 3 of the Resolution. It is indicative of at least a reckless disregard for their contractual obligations that none of the municipal defendants ever sought legal advice about the Town's use of the tower.

> This court has long recognized a cause of action for tortious interference with contract rights ... (citations ommitted) ... "For a plaintiff successfully to prosecute such an action it must prove that the defendant's conduct was in fact tortious. This element may be satisfied by proof that the defendant was guilty of fraud, misrepresentation, intimidation or molestation ... or that the defendant acted maliciously."

Blake v. Levy 191 Conn. 257, 261 (1983)

That the conduct of municipal defendants was in fact tortious can hardly be denied. From the very beginning municipal defendants acted in bad faith, misleading everybody including their own attorney. They misled the plaintiffs about their own use of the tower and their commitment to enforce the law until after plaintiffs signed a release. They misled defendant Koepke by not telling him about the terms of the Resolution they had passed on Nov. 6,

1989 as they connected their own utility meter to his tower on Nov. 8, 1989[11]. They misled the court by collaborating with defendant Koepke, using the tower themselves, while Koepke told the court that he was prevented from "completing and operating his communications tower, thereby causing him great harm"[12].

Not only did municipal defendants mislead plaintiffs about their own use of the tower and their willingness to take legal action to enforce the zoning regulations - until after plaintiffs had signed the release, - they expressly renounced their obligation to take appropriate legal action against defendant Koepke in accordance with ¶ 3 of the Resolution. Thereafter, at all times, until the plaintiffs filed the complaint in the case at bar, the actions of municipal defendants unequivocally manifested an intent not to perform their contractual obligations at the contractually agreed upon time.

Municipal defendants undermined a settlement that would have achieved the objective of ¶ 3 of the Resolution, by concealing information about viable alternatives and by purchasing equipment to be used on defendant Koepke's tower and connecting Town offices to defendant Koepke's tower *while the settlement discussions were in progress.*

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[11]See Exhibit 1, Koepke Deposition pages 36, 37:
Q. In November of 1989, were you aware that the Town Council passed a resolution on November 6th of 1989 wherein under certain circumstances they agreed to take legal action against you to seek removal of the radio tower and to prosecute such action to its conclusion?
A. No, ma'am, I'm not.

[12]See Exhibit 1, ex.12 Koepke v. Town of Coventry p.8 ¶ 34

They allowed defendant Koepke to put agencies such as Tolland County Mutual Aid (Ex.18) and Colchester Emergency Communications Inc. (Ex.95) on his tower to be used as leverage to defeat any injunctive action to remove the tower that might be brought by a future Town Council in accordance with ¶ 3 of the Resolution. In their 12(b)(6) motion, municipal defendants stressed that obtaining an injunction is problematic; they might have added that it is likely to be more so if agencies that provide emergency communications are placed in the middle of the legal action.

Municipal defendants allowed the tower to operate commercially to generate the income to defray Koepke's legal expenses; the Town's legal expenses were more than offset by $2800 per month in free services provided by defendant Koepke, and Koepke's suit for damages was being defended by insurance company lawyers. The litigation didn't cost municipal defendants anything personally, and with a $19 million annual Town budget, they could keep the litigation going indefinitely[13]. Defendant Lewis said "I think the Council looked upon this as an ongoing litigation that would be handled by the courts."[14] While the courts handled the ongoing litigation, the taxpayers of Coventry would get free radio service.

When plaintiffs notified municipal defendants of their intent to sue by letter dated March 9, 1995 (Complaint Exhibit A), instead of signifying an intent to perform their contractual obligations, municipal defendants did not reply. On March 18,1995 the Willimantic Chronicle reported (Ex.66):

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[13]$2800 per month in free services amounts to $33,600 per year or $336,000 over the course of ten years.

[14]See Ex.7, Deposition of Joan Lewis p. 52

> Elsesser recently said the town will continue to fight Oygard's attempts to have the critical communication facility removed. If the ZBA rules against Koepke and the town, the decision would be appealed in court, Elsesser said.

In fact, municipal defendants did continuously fight plaintiffs attempts to have defendant Koepke's tower removed. In legal terminology, defendants acting in concert, tortiously interfered with the contractual agreement between the Oygards and the Town, - specifically ¶ 3 of the Resolution, - from the day the agreement was reached until plaintiffs filed the instant action on October 16, 1995.

COUNT THREE: BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. See Restatement (Second) of Contracts § 205 (1979). See also Connecticut General Statutes § 42a-1-203 "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party ... " The covenant of good faith and fair dealing is essentially "a rule of construction designed to fulfill the reasonable expectations of the contracting parties as they presumably intended." Magnan v. Anaconda Industries, Inc. 193 Conn. 558, 567 (1984)

Plaintiffs reasonably expected that municipal defendants would not conspire with defendant Koepke to *violate* the zoning regulations while their appeal of Judge Vasington's decision was pending. Plaintiffs reasonably expected that municipal defendants would protect the public interest in the validity and enforcement of the Coventry Zoning Regulations. "There is a definite public interest to be

protected in the enforcement of the zoning regulations.." Simko v. Zoning Board of Appeals, 206 Conn. 374, 381 (1988) citing Guilford v. Landon, 146 Conn. 178 (1959).

Plaintiffs reasonably expected that municipal defendants would not disregard due process. 'Due process' has been called "a profound attitude of fairness between man and man, and more particularly between the individual and government" Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 160 (1951).

Plaintiffs reasonably expected municipal defendants to conduct settlement discussions in good faith. Plaintiffs reasonably expected that municipal defendants would not encourage defendant Koepke to *expand* his activities on North School Road while the appeal of Judge Vasington's decision was pending.

Plaintiffs reasonably expected that since the ZBA had "supported and adopted all issues set forth by appellant Susan Oygard" (Ex.55) that municipal defendants would not deliberately undermine the agreed common purpose of ¶ 3 of the Resolution, giving the town attorney, who was representing the ZBA, to understand that they wanted the appeal of Judge Vasington's decision "to go away so they could use the tower in peace"[15]

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> "[i]t is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government."

Heckler v. Community Health Services 467 U.S. 51, 61 n.1381 L.Ed.2d 42, 104 S.Ct 2218 (1984)

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[15]Ex.54

Municipal defendants do not turn square corners. A municipality has several legal avenues to provide radio communication services for its citizens, but municipal defendants did not seek legal avenues, not even when expressly notified by their own attorney that the tower violated the Coventry Zoning Regulations. It was only the prospect of their own liability, only after plaintiffs filed the complaint in the case at bar, that municipal defendants focused on the reasonable expectations of the plaintiffs.

COUNT FOUR: 18 U.S.C. § 1962

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, ... but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes." ... The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity.

Sedima v. Imrex 473 U.S. 479, 497, 105 S.Ct.3275, 87 L.Ed.2d 346 (1985)

Although proof beyond a reasonable doubt is required for criminal prosecution under RICO, proof by a preponderance of the evidence is sufficient to a finding of liability in a civil RICO. Constantino v. TRW, Inc., 773 F.Supp.34, (N.D.Ohio 1991), affd in part, mod.in part and remanded 13 F.3d 969

1.) In a continuing pattern of racketeering activity and in pursuance of mutual designs which had their origin in 1986, defendants violated Title 53a-147 and 53a-148 of the Connecticut Penal Code.

Pursuant to 18 U.S.C. § 1961 'racketeering activity' includes "any act .. involving ... bribery ... which is

chargeable under State law and punishable by imprisonment for more than one year." Violations of § 53a-147[16] and § 53a-148[17] of the Connecticut Penal Code are 'racketeering activities' within the meaning of § 1961.

In 1986, at the time he sought his zoning permits, defendant Koepke offered free use of the proposed North School Road radio tower to municipal defendants. (See Statement of Facts p.3) With the cooperation of the Coventry building inspector he commenced construction of the tower on North School Road despite having been notified of Oygard's appeal to the ZBA. He installed power on October 3, 1986, two weeks after the ZBA revoked his zoning permit. (See Statement of Facts pg.7) Thereafter and until plaintiffs' filed their complaint in the case at bar on October 16, 1995, the North School Road tower was operating with two stop work orders in effect, (Ex.1, ex.3, ex.4), without a restraining order or injunction having been granted by the court, and without a certificate of zoning compliance pursuant to C.G.S.8-3(f) or certificate of occupancy pursuant to § 29-265.

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[16] § 53a-147 Bribery: Class D felony

(a) A person is guilty of bribery if he promises, offers, confers or agrees to confer upon a public servant or person selected to be a public servant, any benefit as consideration for the recipient's decision, opinion, recommendation or vote as a public servant or a person selected to be a public servant.

[17] § 53a-148 Bribe receiving: Class D felony

(a) A public servant or a person selected to be a public servant is guilty of bribe receiving if he solicits, accepts or agrees to accept from another person any benefit for, because of, or as consideration for his decision, opinion, recommendation or vote.

Pursuant to the Coventry Town Charter § 6-1, § 6-2 and § 5-16 (Ex.28) municipal defendants are directly responsible for enforcement of the "laws of the state, the ordinances of the town and all the rules and regulations made in accordance therewith" - including the zoning regulations. Zoning enforcement, although in the first instance the responsibility of the zoning enforcement officer, ultimately depends on the Town Council. Only the Town Council can authorize the town attorney to initiate legal action against a property owner who disregards an enforcement order such as a stop work order. The defendant Town Council routinely authorizes the town attorney to take legal action to enforce the Coventry Zoning Regulations[18].

Municipal defendants clearly understood their role in zoning enforcement. They were expressly advised by their own attorney several times of the illegal status of the tower. Had they been offered space on defendant Koepke's tower at fair market value, they might have paused[19], but the

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[18]See Ex.7, Deposition of Joan Lewis pg.43:
Q. Calling your attention to page 3 of those March 19th, 1990 Meeting Minutes, item 4, where it says,'Peter Halvorson moved to authorize the Town Attorney to seek to enforce the proper zoning regulations against the property owner of 42 Autumn Trail. Lawrence Golden seconded the motion, which carried unanimously."

Did you vote to enforce the zoning regulations against the property owner at 42 Autumn Trail?
A. The record would indicate that I did.
Q. Did the property owner of 42 Autumn Trail offer any free service of any kind to the Town?
A. I have no idea who the property owner of 42 Autumn Trail was, and I have no idea, I have no recollection .

[19]American Paging Co. of St. Paul, Minnesota had

prospect of *free* antenna space proved irresistable. Without consulting with the town attorney, and notwithstanding the fact that they had feasible and lawful (albeit not free) alternatives[20], and notwithstanding that Koepke had a suit for monetary damages pending against the Town, and an administrative appeal pending against the ZBA, municipal defendants decided to use defendant Koepke's tower. For $2800 per month worth of free service, defendant Koepke had the entire executive branch of local government including the dog warden using his tower and he didn't need "Permanent Injunctive relief preventing the Town of Coventry and its agents, officials, boards and commissions from prohibiting the plaintiff from completing construction and utilizing his communication tower facility"[21]

Free use of the North School Road radio tower is a 'benefit' within the meaning of § 53a-146[22] of the

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declined to purchase space on defendant Koepke's tower because of the pending litigation. (See Ex.96)

[20] When asked "In your opinion, is it feasible for the Town to construct, on Town property near the Town Hall, a radio communication tower that would serve the radio communications needs of the citizens of Coventry?", defendant Elsesser answered, "Yes, it is feasible."; defendant Ashley answered "Yes". (Defendant Lewis' response is somewhat unclear, but is apparently in the affirmative.) (See respective responses to interrogatory #6 Exhibits 27, 46, and 13.)

[21] See Ex.1 ex.12 Koepke v.Town of Coventry ¶ 36

[22] See § 53a-146. Definitions: (2) "Benefit" means monetary advantage, or anything regarded by the beneficiary as a monetary advantage, including benefit to any person or entity in whose welfare he is interested.

Connecticut Penal Code. Defendants Lewis, Ashley and Elsesser are 'public servants' within the meaning of § 53a-146[23]. The decision of municipal defendants to use defendant Koepke's tower for free, knowing that the tower was operating illegally, amounted to a nonenforcement decision in return for a bribe, in violation of sections 53a-147 and 53a-148 of the Connecticut Penal Code.

The legislative history of § 53a-147 and § 53a-148 indicates that the bribery statutes were intended to prohibit all forms of corruption in the governmental process. The original versions of § 53a-147 and § 53a-148 were enacted in 1969 as P.A. 828, (House Bill 7182), as part of a comprehensive overhaul of the Connecticut criminal statutes. Passed in 1969, P.A. 828 became effective October 1, 1971.

"Section 53a-147 became effective with the Penal Code on October 1, 1971. Unlike its predecessor § 53-147, it does not require proof of a specific intent to influence official behavior." State v. Carr, 172 Conn. 458, 466 (1977)

The 1971 Commission Comment to PART XI. BRIBERY, OFFENSES AGAINST THE ADMINISTRATION OF JUSTICE AND OTHER RELATED OFFENSES of Title 53a (See Ex.97) makes it clear that the statutes are purposely broad:

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[23]See § 53a-146. Definitions: (3) "Public servant" is an officer or employee of government, elected or appointed, and any person participating as adviser, consultant or otherwise, paid or unpaid, in performing a governmental function.

> [T]hese sections are *purposely broad and general*. Their purpose is to prohibit all forms of corruption of the governmental process, ... They make clear that the recipient is culpable as well as the donor. They broaden the field to *cover all governmental officials - state or local - elected, appointed or advisory...* (*emphasis added*)

The legislature further expanded the reach of the bribery statutes in 1980 with the enactment of P.A. 80-479. (Substitute House Bill No. 5580) (Ex.98) P.A. 80-479 amended the language of the bribery statutes to broaden the coverage to paid or unpaid public servants. Rep. Tulisano reporting on H. B. 5580 to the House of Representatives on April 17, 1980 (Ex.99) stated:

> We think .. the bill before us, includes the language of what most people in the General Assembly have wanted to see, an *expanded* bribery statute. (*emphasis added*)

Bribe receiving corrupts the governmental process. It is clear that the legislature considers it no less corrupt for a public servant to accept a benefit on behalf of an entity in whose welfare he is interested, than to accept it personally. See § 53a-146 (fn 22) See also § 53a-11:

> A person shall be criminally liable for conduct constituting an offense which he performs, or causes to be performed in the name of or in behalf of a corporation to the same extent as if such conduct were performed in his own name or behalf.

That defendants Lewis, Ashley and Elsesser accepted the benefit of free use of defendant Koepke's tower on behalf of the Town of Coventry, a municipal corporation in whose welfare they are interested, may satisfy their private conscience[24], but it does not relieve them of liability for bribe receiving in violation of § 53a-148.

2. In violation of 18 U.S.C. 1962(a) defendants used or invested the income derived from their racketeering activities in the Town of Coventry, a municipal corporation which affects interstate commerce.

18 U.S.C.§ 1962(a) provides in relevant part:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity ... to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, ... or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

The Town of Coventry, a municipal corporation, was the direct beneficiary of the racketeering activity carried on by municipal defendants. Defendants Lewis, Ashley and Elsesser are high officials in the municipal corporation.

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[24]"That a conclusion satisfies one's private conscience does not attest its reliability .. and self righteousness gives too slender an assurance of rightness." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 160 (1951)

Defendant Lewis was Chairman of the Coventry Town Council from Nov. 1985 until Nov. 1991 and defendant Ashley was Chairman of the Coventry Town Council from Nov. 1991 until Nov. 1995. (See Lewis and Ashley interrogatories Ex.13 and 46) Defendant Elsesser has been Chief Executive Officer of the Town of Coventry since May 1988. (See Elsesser Deposition Ex.4, p.10)

The defendant Town of Coventry, as a municipal corporation, is capable of holding a legal or beneficial interest in property, and therefore is a 'person' within the meaning of 18 U.S.C. § 1961. See In re CitiSource, Inc. Securities Litigation, 694 F.Supp.1069, (S.D.N.Y.1988) The defendant Town of Coventry affects interstate commerce.[25]

Generally, when directors or officers of a corporation authorize, ratify, tolerate, or participate in crimes or malicious torts, the corporation is held civilly or criminally liable, particularly when the corporation benefits from the

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[25]See Ex. 1 Koepke Deposition p. 50:
A. [A]ll of those serial number ID tags I just mentioned are equipment that the Town of Coventry purchased which was located at North School Road.
Q. Where is that equipment -- where do you order that equipment from, Mr. Koepke?
A. Well, serial number 01205 was TXRX Company located in *Tonawanda, New York.* 01224, transmitter combiner was Antenna Specialists Company; they're in *Cleveland, Ohio.* Oh boy. You want to know where the transmitters were all located?
Q. If you recall.
A. Well, the serial numbers indicate they're all RCA, so they would have been purchased from RCA.
Q. Where is RCA, do you know?
A. *Meadowlands, Pennsylvania.* ..

officers' offensive conduct. Genty v. Resolution Trust Corporation 937 F.2d 899, 908 (3d Cir. 1991) Failure of the directors of the corporation to actually vote to authorize the criminal or unlawful conduct does not relieve the corporation of liability. "Criminal acts are not usually made the subject of votes of authorization or ratification by corporate Boards of Directors; and the lack of such votes does not prevent the act from being the act of the corporation..." Commonwealth v. Beneficial Finance Co. 360 Mass. 188, 275 N.E.2d 33 (1971)

The same principles govern corporate liability under 18 U.S.C. § 1962(a). "[w]hen the fruits of racketeering come to rest in a corporate-enterprise, that enterprise is within RICO's intended reach. Section 1962(a) is designed to recover these proceeds." Haroco, Inc. v. American Nat'l Bank & Trust Co., 647 F.Supp. 1026, 1033 (N.D.Ill. 1986) To be liable under subsection (a), a corporation-enterprise must be the direct or indirect beneficiary of the racketeering activity carried on by the corporate entity's high officials. Petro-Tech, 824 F.2d at 1361; Haroco v. American National Bank and Trust Co., 747 F.2d 384, 402 (7th Cir. 1984)

In the case at bar, the defendant corporation is a municipal corporation. Liability of municipal corporations under § 1962(a), has not been directly addressed by the Second Circuit Court of Appeals.

Plaintiffs recognize that the Third Circuit in Genty v. Resolution Trust Corp. 937 F.2d 899 (3d Cir. 1991) and district courts, in Rini v. Zwirn, 868 F.Supp. 270 (E.D.N.Y 1995) for example, have held that municipal corporations may not be held civilly liable under RICO. Two reasons have been advanced for holding municipal corporations immune from liability: i) a municipal corporation lacks the *mens rea* to commit the predicate acts and ii) treble damages under RICO are punitive in nature and such damages should not "be visited upon the shoulders of blameless and unknowing taxpayers".

The district court in Rini v. Zwirn held that municipal corporations lack the requisite *mens rea*. The Third Circuit in Genty v. Resolution Trust however, did not find such a rationale for municipal immunity from RICO liability persuasive:

> The RICO statute itself is silent on the issue of *mens rea* and its legislative history offers no illumination of the congressional intent on this point. ... The reasoning of the above cases to the extent is rests upon a failure of RICO *mens rea* does not distinguish adequately those situations where municipal corporations are indeed held liable for the tortious or criminal acts of its officials, even where such acts require a malicious, willful or criminal intent. Indeed, no court holding a municipality incapable of forming a RICO *mens rea* has defined what it meant by the term. Nor have these courts attempted to analyze the elements of the *mens rea* required for the specific predicate offenses on which the RICO charges are structured. Furthermore, no court discussing the *mens rea* issue has yet offered a principled basis for distinguishing how a municipality can "form" the requisite intent to be liable for an isolated violation of a predicate offense but be incapable of forming such intent when the offense is part of a pattern of such crimes under RICO. Nor can we discern such a guiding principle.

Id. p. 908

Although unpersuaded by the *mens rea* rationale, the Third Circuit in Genty held that municipalities are immune from liability under RICO because treble damages under RICO are punitive in nature and to award such damages

against a municipality punishes only the general public who ordinarily did not participate in the commission of the offense. The district court in Rini v. Zwirn however noted that such a ground for holding a municipality immune from liability under RICO "requires an authoritive resolution of the question of whether civil RICO treble damages are "punitive" "remedial" or both, in nature." Id. p. 295

Depending on the circumstances, RICO damages imposed on a municipality may not be punitive at all. The cost of complying with zoning and environmental regulations can be significant, and with RICO damages limited to damages to business and property, the savings to a municipality from conducting its affairs through a pattern of racketeering activity over an extended period of time may greatly exceed even treble damages for injury to business or property. This is especially true when the victims of the racketeering activity are those members of the community who have the least amount of property.

> Unlike punitive damages, treble damages are not discretionary either in award or amount, they are not based upon an amount adjudged necessary to punish or deter, and they are not commensurate with the willful, wanton, or reckless conduct of the wrongdoer. As such, RICO treble damages are neither awarded for the same reasons nor in the same manner as either compensatory or punitive damages. Rules that have developed reflecting the traditional dichotomy of compensatory or punitive damages, if mechanically applied to RICO threaten, therefore, to frustrate its multi-faceted character. Instead courts should develop rules under RICO in accord with Congress' intent that its treble damage provision serve its broad remedial purposes.

Morse, Judith A. Treble Damages Under Rico: Characterization and Computation, Notre Dame Law Review (1986) p.1

When as here, the defendant Town of Coventry was the direct beneficiary of the 'racketeering activity', where the taxpayers are not unknowing, and where the defendant Town Council and defendant Town Manager wield the whole executive power of the municipal corporation, municipal liability under § 1962(a) is appropriate.

3. In violation of 18 U.S.C. § 1962(c) defendants Lewis, Ashley, Elsesser, and Koepke conducted the affairs of the Coventry Town Council through a pattern of racketeering activity.

18 U.S.C. § 1962(c) provides in relevant part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The defendant Town Council, as a legal entity defined by Chapter III of the Coventry Town Charter, (Ex.28) is an enterprise within the meaning of 18 U.S.C. § 1961. See U.S. v. Angelilli 660 F.2d 23, 33 (2d Cir. 1981) Defendants Lewis, Ashley, and Elsesser all participate in the operation and management of the enterprise. As co-conspirator, defendant Koepke is associated with the enterprise. Defendants Lewis, Ashley, Elsesser and Koepke

are therefore liable as RICO 'persons' within the meaning of § 1962(c). U.S. v. Viola, 35 F.3d 37 (2d Cir. 1994)

4. In violation of 18 U.S.C.§ 1962(d) defendants Lewis, Ashley, Elsesser and Koepke conspired to violate § 1962(a) and § 1962(c).

18 U.S.C. § 1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

Pursuant to § 53a-48 of the Connecticut Penal Code a person is guilty of conspiracy when "with intent that the conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy." Bribery or Bribe receiving in violation of § 53a-147 and § 53a-148 is conduct constituting a crime; defendants agreed to engage in such conduct, and, as the facts clearly establish, they committed several overt acts in pursuance of their mutual design to unlawfully construct and operate a commercial radio tower on North School Road in Coventry.

CONCLUSION

Summary judgment in favor of the plaintiffs should be granted.

PLAINTIFFS,

NORVALD OYGARD
s/ Norvald Oygard
Norvald Oygard
235 North School Road
P.O. Box 62
Coventry, CT 06238
860-742-5209

SUSAN OYGARD
s/ Susan Oygard
Susan Oygard
235 North School Road
P.O. Box 62
Coventry, CT 06238
860-742-5209

98-7578

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUSAN OYGARD,
NORVALD OYGARD

Plaintiffs-Counter-Defendants-
Appellants

-vs-

TOWN OF COVENTRY,
COVENTRY TOWN COUNCIL,
JOAN LEWIS, JOHN ELSESSER,
and RICHARD ASHLEY

Defendants-Counter-Claimants-
Appellees

ALAN KOEPKE

Defendant - Appellee

BRIEF FOR PRO-SE PLAINTIFFS - APPELLANTS

SUSAN OYGARD, Pro se
NORVALD OYGARD, Pro se
235 North School Road
P.O. Box 62
Coventry, CT 06238
(860) 742-5209

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VIII. ARGUMENT

1. DID THE PLAINTIFFS HAVE A CONSTITUTIONAL "PROPERTY INTEREST" SECURED BY CONN. GEN. STAT. § 8-7, IN THE RIGHT TO APPEAL THE DECISION OF THE ZONING ENFORCEMENT OFFICER TO ISSUE A ZONING PERMIT TO AN ABUTTING PROPERTY OWNER, AND IF SO, DID THE DIMENSIONS OF THAT "PROPERTY INTEREST" INCLUDE A STAY OF ALL PROCEEDINGS, INCLUDING CONSTRUCTION AND/OR USE, UNTIL THE PLAINTIFFS HAD THE OPPORTUNITY TO BE HEARD BY THE ZONING BOARD OF APPEALS?

Plaintiffs did have a constitutional "property interest" in the right to appeal the decision of the zoning enforcement officer to issue a zoning permit to an abutting property owner and moreover, the dimensions of that property interest included a stay of all proceedings, including construction and use, until the plaintiffs had the opportunity to be heard.

"Property interests" are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)

Conn. Gen. Stat. § 8-7 provides in relevant part:

§ 8-7. Appeals to board.

> The concurring vote of four members of the zoning board of appeals shall be necessary to reverse any order, requirement or decision of the official charged with the enforcement of the zoning regulations. ... *An appeal may be taken to the zoning board of appeals by any person aggrieved.* .....

The right to appeal was a benefit to which plaintiffs were entitled by Conn. Gen. Stat. § 8-7. It was therefore a constitutional "property interest" of which plaintiffs could not be deprived by state actors without due process of law.

The right to appeal entails more than the opportunity to fill out some paperwork and pay a forty dollar filing fee. As appellants under Conn. Gen. Stat. § 8-7, plaintiffs were entitled to a stay of all proceedings related to the issuance of defendant Koepke's zoning permit while the appeal was pending before the board. Conn. Gen. Stat. § 8-7 provides in relevant part:

> An appeal shall not stay any such order, requirement or decision which prohibits further construction or expansion of a use in violation of such zoning regulations except to such extent that the board grants a stay thereof. *An appeal from any other order, requirement or decision shall stay all proceedings in the action appealed from ...*

There is a clear legislative intent, supported by the plain language, the legislative history and the statutory purpose, that the above recited language means *all* proceedings related to the issuance of a permit, including construction and use, are stayed by an appeal, until the board has reviewed the matter under appeal. (See plaintiffs Motion for Summary Judgment Memorandum of Law pages 1-5, (App 185-189) incorporated herein by reference.)

Plaintiffs filed their appeal to the board on August 12, 1986, before any construction commenced, and Koepke was immediately notified of the appeal. Plaintiffs had a "property interest" secured by Conn. Gen. Stat. § 8-7, in the opportunity to be heard by the board *before* defendant Koepke proceeded with construction. With the cooperation

of municipal defendants, however, Koepke proceeded to construct the tower in violation of the statutorily imposed stay.

The district court did not address whether Conn. Gen. Stat. § 8-7 created a property interest or what the dimensions of such a property interest might be, although plaintiffs repeatedly and distinctly pointed out that the "property interest" they claim arises out of that statute. (App. 63-68, 81-96, 185-194)

Instead, the district court mischaracterized plaintiffs' complaint. See Ruling p. 9 (App 351) "[A]s noted above, the property interest plaintiffs claim to have been deprived of is the right to the proper enforcement of the town's zoning regulations with respect to an adjacent landowner's property." That is not true. The property interest plaintiffs claim to have been deprived of by state actors is a stay of all proceedings related to the issuance of defendant Koepke's zoning permit until they had the opportunity to be heard.

2. DID THE PLAINTIFFS HAVE A CONSTITUTIONAL "PROPERTY INTEREST" SECURED BY CONN. GEN. STAT. § 8-8, IN THE BENEFIT OF THE ZONING BOARD OF APPEALS DECISION SUSTAINING THEIR APPEAL?

Plaintiffs did have a constitutional "property interest" in the benefit of the board decision in their favor. On September 16, 1986, the zoning board of appeals sustained the Oygard appeal and revoked Koepke's zoning permit. Under Conn. Gen. Stat. § 8-8(g) the decision of the board was not stayed during the pendency of Koepke's administrative appeal of the board's decision. Conn. Gen. Stat. § 8-8(g) provides in relevant part:

> The appeal shall state the reasons on which it has been predicated and shall not stay proceedings

> on the decision appealed from. However, the court to which the appeal is returnable may grant a restraining order, on application, and after notice to the board and cause shown.

The benefit of the board decision sustaining their appeal was a constitutional "property interest" to which the Oygards were entitled by Conn. Gen. Stat. § 8-8(g). The statute itself defines the procedure by which the Oygards could be deprived of that "property interest". Only upon the grant of a restraining order, on application, and after notice to the board and cause shown, could Koepke proceed with construction and use of the tower during the pendency of the administrative appeal. Moreover, all defendants clearly understood what the statute required. Even as he was proceeding without court authority, Koepke attempted to obtain a restraining order. No restraining order was ever issued however.

Fong v. Zoning Board of Appeals of the Town of Greenwich 212 Conn. 628, 563 A.2d 293 (1989) is a case on point. In Fong, a neighbor appealed the decision of the building inspector to issue a building permit to the owner of an abutting commercial property. The Greenwich Planning and Zoning Board of Appeals sustained the appeal of the neighbor and revoked the building permit that had been issued to the owner of the commercial property, just as, in the case at bar, the Coventry Zoning Board of Appeals sustained the Oygard appeal and revoked the zoning permit that had been issued to Koepke.

The question in Fong was whether the neighbor was an indispensable party to an appeal of the board's decision. The Connecticut Supreme Court held that the neighbor, Pettingill, was an indispensable party explaining:

> Pettingill was not merely an abutter, however, but the person who initiated before the board the

> very proceeding that has resulted in the present appeal. Unlike other abutters or aggrieved members of the public, whose interests may be regarded as adequately represented by the board itself, he had become a party to the administrative proceeding. If he had not prevailed before the board, he could have appealed from its decision. Having been successful, Pettingill acquired a special interest in the subject matter of any appeal resulting from the proceeding that might deprive him of the benefit of its outcome before the board in his favor. *We consider this benefit to be equivalent to the "right" granted by a zoning board to a landowner to use his property in a certain manner. (emphasis added)*

Id. at 633-634

A "right" granted by a zoning board to a landowner to use his property in a certain manner is a "property interest".[57]

On September 26, 1989 the trial court rendered a decision in Koepke's favor in the administrative appeal Koepke v. ZBA, but the trial court decision was appealed by the Oygards, and the appeal *automatically stayed* all proceedings to enforce or carry out the judgment of the trial court. As appellants to both the Connecticut Appellate Court and the Connecticut Supreme Court, the Oygards had a "property interest", secured by Conn. Gen. Stat. § 8-8(o), in

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[57]See also Conn. Gen. Stats. § 8-8(f) Service of process shall also be made on each person who petitioned the board in the proceeding, provided his *legal rights, duties or privileges were determined therein. (emphasis added)*

the benefit of the automatic stay until the final determination of the cause. Conn. Gen. Stat. § 8-8(o) provides in relevant part:

> The procedures on appeal to the appellate court shall, except as otherwise provided herein, be in accordance with the procedures provided by the rule or law for the appeal of judgments rendered by the superior court..

See also Connecticut Rules of Court § 4046:

> In all actions, except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment shall be automatically stayed until the time to take an appeal has expired; if an appeal is filed, such proceedings shall be stayed until the final determination of the cause.

The procedures to deprive the Oygards of the "property interest" in the benefit of the automatic stay are found within the same section of Practice Book. "[The judge who tried the case] may at any time, upon motion and hearing, order that the stay be terminated." Conn. Practice Book § 4046. The Oygards were entitled to notice and opportunity to be heard *before* the defendants, acting in concert, proceeded to carry out the judgment of the trial court by installing a second utility meter on the tower for Town equipment and adding commercial customers to generate additional revenues. Koepke never even filed a motion to terminate the automatic stay.

Plaintiffs distinctly and repeatedly pointed out that Conn. Gen. Stats. § 8-8 and § 4046 of the Connecticut Practice Book gave rise to "property interests" but the district court did not confront the issue.

3. DID MUNICIPAL DEFENDANTS AND DEFENDANT KOEPKE CONSPIRE TO VIOLATE PLAINTIFFS' CONSTITUTIONAL RIGHTS TO DUE PROCESS UNDER CONN. GEN. STATS. § 8-7 AND § 8-8?

> *" The touchstone of due process is the protection of the individual against arbitrary action of government."*

Dent v. West Virginia, 129 U.S. 114, 123 (1889)

Having filed their appeal to the board before any construction commenced, plaintiffs were *entitled*, by Conn. Gen. Stats. § 8-7, to the opportunity to be heard *before* defendant Koepke proceeded to construct a commercial radio tower across the street. Likewise, having prevailed before the board, the plaintiffs were *entitled,* Conn. Gen. Stat. § 8-8, to the opportunity to be heard *before* the defendants proceeded with construction and operation of the tower.

Municipal defendants and defendant Koepke violated plaintiffs' constitutional rights to due process when they conspired[58] to construct and operate a commercial radio

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[58]A civil conspiracy is an agreement between two or more persons to do a criminal or unlawful act or a lawful act by unlawful means, an act by one or more of the conspirators in furtherance of that goal and resulting damage to the plaintiff. Williams v. Maislen 116 Conn. 433 (1933) Govenors Grove Condominium Assoc. v. Hill Development Corp., 36 Conn. Supp. 144, 414 A.2d 1177 (1980), Marshak v. Marshak, 226 Conn. 652 (1993) "Resulting damage to the plaintiff" is not an element of a criminal conspriacy. See § 53a-48 of the Connecticut Penal Code: (a) "A person is guilty of

tower during the pendancy of the appeals process governed by Conn. Gen. Stat. § 8-7 and § 8-8.

In its Ruling p. 12 (App 354) the district court stated "[i]n the present case the plaintiffs took full advantage of their opportunity to be heard by pursuing their claims at the zoning level, the superior court, the appellate court and the supreme court. Not only did plainitffs take full advantage of their opportunity to be heard, but they succeeded when they did so."

In fact, plaintiffs were denied the opportunity to be heard *before* the defendants proceeded to construct and operate a commercial radio tower across the street. "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." Fuentes v. Shevin, 407 U.S. 67, 81, 92 S.Ct. 1983, 1995, 32 L.ed.2d 556.(1972)

Furthermore, the thrust of plaintiffs' complaint, which they endeavored to make clear,[59] is that plaintiffs were denied the benefit of their success, as the defendant Town Council and defendant Town Manager blocked enforcement of the ZBA decision and proceeded to use defendant Koepke's tower in violation of Conn. Gen. Stat. § 8-8.[60] The right to appeal is meaningless if state actors can

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conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

[59]Plaintiffs are pro se. Their supporting papers should be read liberally, and interpreted to raise the strongest arguments that they suggest. Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994)

[60]It was only after plaintiffs commenced the instant actionand municipal defendants found themselves personally

arbitrarily deny an appellant the benefit of a successful appeal.[61] (For the application of Conn. Gen. Stat. § 8-8 to a fact pattern similar in many respects to the one in the case at bar, see discussion of Bauer v. Waste Management 239 Conn. 515, 686 A.2d 481 (1996) in plaintiffs' objection to municipal defendants' motion for summary judgment pgs. 3-7 (R 48) (App 305-309) incorporated herein by reference.)[62]

Municipal defendants were not mere passive observers of Koepke's unlawful activities. Koepke violated the law with impunity because the Town Manager, and agencies under the Town Manager's direct supervision and control, including the Coventry Police Department, were using the tower for free, and no town agency had any authority under the Town Charter to enforce the law against the Town Council or the Town Manager.[63] There was a

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involved in the litigation they had fomented for nine years that they decided to move the tower to the Coventry Town Hall.

[61]The district court missed the point that plaintiffs here were not "disappointed applicants" to the ZBA who had redress through the administrative appeals process pursuant to Conn. Gen. Stat. § 8-8. Ruling p. 10 (App 352) Plaintiffs were *successful* applicants to the ZBA who were arbitrarily denied the benefit of their success by state actors - the Town Council and Town Manager - who wield the whole executive power of the Town of Coventry.

[62]If there is any question as to whether the procedures required by Conn. Gen. Stats. § 8-7 and § 8-8 were violated or whether the violations were wilful, plaintiffs respectfully request this court to exercise its authority under FRAP and Local Rule § 0.27 and certify the question to the Connecticut Supreme Court.

[63]In Waterbury, Conn. when Waterbury mayor Joseph

symbiotic relationship between the municipal defendants and defendant Koepke. The Town had a direct financial stake in Koepke's business. There was a "concert of purpose that warrants description of [defendants'] conduct as *state action*." (*emphasis added*) Standardbred Owners Assoc. v. RRA 985 F.2d 102, 105 (1993) See also Adickes v. S.H. Kress & Co. 398 U.S. 144, 90 S.Ct. 1985, 26 L.Ed.2d 142 (1970).

With semantic sleight of hand, however, the district court, turns 'state action' into 'state inaction'. See Ruling p. 1. (App 343) "The issues presented are: (1) Whether the plaintiffs' right to have the town's zoning regulations enforced ... rises to the level of a property interest protected by the due process clause .. "

U.S. Supreme Court cases on the constitutional implications of 'state inaction' or 'nonenforcement' such as DeShaney v. Winnebago County Department of Social Services 109 S.Ct. 998 (1989) and Heckler v. Chaney 470 U.S. 821 (1985) and their Second Circuit progeny Gagliardi v. Village of Pawling 18 F.3d 188 (2d Cir. 1994) and Zahra v. Town of Southold 48 F.3d 674 (2d Cir. 1995), which provide the underpinning for the district court's ruling, do not stand for the proposition that a state actor, who actively participates in, encourages, and financially benefits from an

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Santopietro bypassed the civil service commission and appointed his political allies to detective positions on the city police department, the civil service commission filed a Writ of Mandamus and a Writ Quo Warranto to compel the mayor to abide by the civil service list. See Gesmonde et. al. v. City of Waterbury 231 Conn. 754 (1995). The Coventry ZBA could not file a Writ of Mandamus against the Coventry Town Council to enforce its decision because the ZBA and the Town Council were both represented by the same attorney.

illegal act does not infringe the constitutional rights of those harmed by the illegal act.

DeShaney, addresses the constitutional implications of pure state inaction. In DeShaney the Winnebago County Department of Social Services failed to remove a child from his father's custody after receiving reports that the child was being physically abused by the father. Eventually the father beat the child so severely that the child suffered permanent and severe brain injuries. The question presented to the court was whether failure to remove the child from the father's custody constituted a violation of the child's fourteenth amendment right to liberty. The U.S. Supreme Court held that the child's *constitutional* rights were not infringed because the father was not a state actor.

In the case at bar, the Coventry Town Council, the Coventry Town Manager and defendant Koepke clearly are state actors. The district court's reliance on DeShaney and its Second Circuit progeny is therefore misplaced.

Heckler v. Chaney, on which Gagliardi v. Village of Pawling supra largely relies, is equally inapt. In Heckler v. Chaney individuals who had been sentenced to die by lethal injection, sued the FDA, on the grounds that federal law required the FDA to approve as 'safe and effective' any drug distributed in interstate commerce, and, not surprisingly, the FDA had failed to do so with respect to the drug used for lethal injection. The Court held that when an administrative agency is vested with discretion in a decision to undertake enforcement action, as was the FDA, the agency's decision not to undertake certain enforcement actions is not subject to judicial review. The Court pointed out, however, citing Citizens to Preserve Overton Park, Inc. v. Volpe 401 U.S. 402 (1971), that an *affirmative act in violation of a statute* was precisely the opposite situation, Heckler v. Chaney *supra* at 831, and such an act would be subject to judicial review.

Overton Park, is far more relevant, both factually and legally, to the case at bar than Heckler v. Chaney. In Overton Park a group of private citizens and conservation organizations, contended that the Secretary of Transportation violated federal statutes by authorizing the expenditure of federal funds for the construction of a six-lane interstate highway through a public park in Memphis, Tennessee, without making formal findings, as required by statute, that there was no feasible and prudent alternative to destroying 26 acres of parkland. The Secretary of Transportation argued that he had exercised his own independent judgment and concluded that formal findings were unnecessary.

The Supreme Court rejected the Secretary of Transportation's argument noting:

> If the statutes are to have any meaning, the Secretary cannot approve the distruction of parkland unless he finds that alternative routes present unique problems. Plainly, there is "law to apply" and thus the exemption for action "committed to agency discretion" is inapplicable.

Id. at 412

Likewise, in the case at bar, municipal defendants cannot approve the installation of town transmitters and antennas on defendant Koepke's tower, and proceed to use the tower, in the face of a ZBA decision revoking defendant Koepke's zoning permit, *unless* they obtain court authority to do so. As in Overton Park, there is "law to apply", (Conn. Gen. Stat. § 8-7 and § 8-8 in particular) and municipal defendants cannot exercise their own independent judgment and conclude that the stays of construction and use imposed by stop work orders and the regulatory statutes governing zoning appeals are unnecessary.

The district court's reliance on Parratt v. Taylor, 451 U.S. 527 (1981) for the proposition that "post deprivation remedies made available by the State can satisfy the due process clause" is also misplaced. Parratt v. Taylor addresses the constitutional implications of *negligent* deprivation of property by the state. In Parratt v. Taylor administrative personnel at a prison misplaced an inmates's hobby kit. The Supreme Court pointed out that in such situations, it would not even be feasible to hold a pre-deprivation hearing. The case at bar concerns *deliberate* state action. Deliberate state action does implicate the Due Process Clause. Daniels v. Williams 474 U.S. 327, 331 (1986).

Finally, the district court points out "due process is flexible and calls for such procedural protection as the particular situation demands." Ruling p. 12 (App 354) Due process is not so flexible as to permit active connivance between the Coventry Town Council, the Coventry Town Manager and defendant Koepke to violate the regulatory statutes governing zoning appeals, and to subject the Oygards to escalating threats during the course of a nine year appeals process.

4. DID MUNICIPAL DEFENDANTS AND DEFENDANT KOEPKE CONSPIRE TO VIOLATE PLAINTIFFS' CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION UNDER THE COVENTRY ZONING REGULATIONS AND THE CONNECTICUT GENERAL STATUTES?

As noted in the preceeding section, the conduct of municipal defendants in the case at bar constitutes 'state action'. Unlike the plaintiffs in Zahra v. Town of Southold

48 F.3d 674 (2d Cir. 1995)[64], and Gagliardi v. Village of Pawling 18 F.3d 188 (2d Cir. 1994)[65] plaintiffs here explicitly claim that municipal defendants conspired with defendant Koepke to *violate* the Town Code (as well as several state statutes including the regulatory statutes governing zoning appeals).

The district court erroneously analysed plaintiffs' equal protection claim as if it were a claim, like Zahra's, of "selective enforcement" of the Town Code, the "murky corner of equal protection law in which there are surprisingly few cases" Zahra v. Town of Southold 48 F.3d 674, 683 (2d Cir. 1995)

A conspiracy to violate the law - a conspiracy in which state actors are involved - is in the brightly lit corner of equal protection law.

> The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful.

Adickes v. S.H. Kress & Co. 398 U.S. 144, 90 S.Ct. 1958, 26 L.Ed.2d 142 (1970)

The district court cites no authority holding that the two prong test (Ruling p. 13, App 355) for an equal

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[64]See Zahra at 682, "Zahra's equal protection claim is based entirely upon an allegation that the Town, ... selectively enforced the Town code against him."

[65]See Gagliardi at 193, "The Gagliardis contend that failure of the Municipal Defendants to enforce the Pawling Code violated their right to equal protection of the laws."

protection violation based on selective enforcement of the law is applicable when there is direct and wilful state action to violate the law.

Even if the two prong test applies, however, the district court erroneously concluded that plaintiffs failed to demonstrate either that (1) they were treated differently from other similarly situated persons; or (2) that such selective treatment was based upon the malicious or bad faith intent to injure the plaintiffs.

With respect to prong (1) the only way plaintiffs could be treated equally is if municipal defendants normally conspire with zoning violators to violate the zoning regulations and the regulatory statutes governing zoning appeals, which they don't. There is a presumption that municipal defendants do not ordinarily violate the law. Against the presumption that "all necessary prerequisites to the validity of official acts are presumed to have been complied with",[66] plaintiffs have demonstrated that they were treated differently from similarly situated person.

As for prong (2), a reasonable jury might conclude that the defendants intended to impede or prevent the Oygards from exercising rights secured by Conn. Gen. Stat. § 8-7 and § 8-8, and/or to oppress the Oygards because of their exercise of those appeal rights. U.S. v. Guest 383 U.S. 745, 760, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966) See plaintiffs' Motion for Summary Judgment Memorandum of Law Pgs. 11-16. (App. pgs 195-200) incorporated herein by reference.

The district court states "In order to establish an equal protection violation, the plaintiffs must prove that the defendants intended to discriminate against them, and not merely that they sought to confer benefits upon Koepke."

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[66]Graham, Michael, Federal Rules of Evidence in a Nutshell, West Publishing Co. p.60

Ruling p. 14 (App 356) Plaintiffs maintain that municipal defendants sought to confer benefits upon *themselves* by conspiring with Koepke to violate the law. As the town attorney made abundantly clear to Oygard's attorney, Mark Branse, the Town Council wanted to "use the tower in peace", (R 37 Ex.54) (App 585) which it could not do as long as the Oygards asserted their rights to appeal. Evidence in the record shows that the Oygards were the targets of discrimination. See letter dated November 17, 1986 from Coventry Town Manager to Susan Oygard (R 36 Ex. 7 Lewis Deposition, dep. exhibit 7) "*Further pronouncements may evoke actions contrary to your wishes.*" See also newspaper article dated March 18, 1995 (R 37 Ex.66) (App 598) "*Elsesser recently said the town will continue to fight Oygard's attempts to have the critical communication facility removed.*"

5. DID THE DISTRICT COURT CORRECTLY CONCLUDE THAT PLAINTIFFS LACK STANDING TO RAISE A RICO CLAIM?

The district court did not correctly conclude that plaintiffs lack standing to raise a RICO claim. An injury to business or property sufficient to confer standing to a RICO plaintiff is not limited to a physical injury to real property only. In Securitron Magnalock Corp. v. Schnabolk 65 F.3d 256, 262 (2d. Cir. 1995) cert. denied 516 U.S. 1114, 116 S.Ct.916, 133 L.Ed.2d 846 (1996) this court affirmed a jury award of RICO damages to a business for out-of-pocket expenses, lost profits, and injury to reputation and/or loss of goodwill.

1) Out-of-pocket expenses confer standing on plaintiffs to raise a RICO claim.

Plaintiffs submitted uncontroverted evidence that they had incurred $67,000 in legal fees for the opportunity to be heard at a duly noticed ZBA hearing.[67] Plaintiffs' out-of-pocket legal expenses for the opportunity to be heard at a duly noticed ZBA hearing were clearly forseeable economic damages when, in June 1995, municipal defendants and defendant Koepke, acting in concert, blatently disregarded the decision of the ZBA and denied plaintiffs the benefit of the ZBA decision sustaining their appeal.

Furthermore, in the administrative appeal of the 1995 ZBA decision, defendant Koepke raised the frivolous claim that Oygard's appeal to the ZBA was untimely.[68] A claim is frivolous when the highest court of the state has decided the very issue, and recently, against the party reasserting it. The issue of the timeliness of the Oygard appeal to the board had been finally resolved by the Connecticut Supreme Court only ten months before defendant Koepke reasserted it. Koepke v. Zoning Board of Appeals 230 Conn. 452, 456 (1994) After plaintiffs had fully briefed the issue before the Connecticut Appellate Court and the Connecticut Supreme Court, plaintiffs were obliged to brief it again in 1996 before

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[67]R 37, Exhibits 60-65

[68]R 36 Exhibit 1, Koepke Deposition pags 62,63

Q. And isn't it true that in your administrative appeal filed June 19, 1995 you claim that the Board improperly refused to determine that Susan Oygard's appeal was not filed in a timely manner, and thus that the Board lacked jurisdiction to hear her appeal?

A. That was probably one of our ...

Q. Arguments?

A. Arguments, yes.

the Tolland County Superior Court.[69] Plaintiffs expenses to litigate the timeliness issue for eight years were *clearly foreseeable economic damages* when, less than a year after the Connecticut Supreme Court rendered a final decision on the issue, Koepke raised the same claim against the same parties. Under Connecticut law, for vexatious litigation, "Any cost of litigation in a former trial less taxable costs would be compensatory damages suffered by a plaintiff by reason of the former suit" Vandersluis v. Weil 176 Conn. 353, 359 (1978) Out-of-pocket legal expenses incurred as a result of frivolous litigation are compensable damages under RICO. Bankers Trust Co. v. Rhoades 859 F.2d 1096, 1105 (2d Cir. 1988) In plaintiffs' motion for summary judgment, plaintiffs pointed out that they had incurred out-of-pocket expenses as a result of defendants' conduct. (R 35 pg. 15) (App. 199) Plaintiffs made the same point in their objections to defendants' motions for summary judgment (R 49 pg. 7) (App 333), and in their Reply brief (R 53 pg. 4)(App 278) The district court erred in failing to find that out-of-pocket expenses gave plaintiffs standing to assert a RICO claim.

2) Devaluation of plaintiffs' property on North School Road gave plaintiffs standing to assert a RICO claim.

> The test of proximate cause, as we summarized it in Hecht, is whether the defendant;s acts "are a substantial factor in the sequence of responsible causation" and whether "the injury is reasonably forseeable or anticipated as a natural consequence."

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[69]R 37 Ex. 78 pgs. 9-11, (App 571-573)

Standardbred Owners Association v. Roosevelt Raceway Assoc. 985 F.2d 102, 104 (2d Cir. 1993)

It is undisputed that defendant Koepke's tower did not exist on August 12, 1986 when plaintiffs filed their appeal to the Zoning Board of Appeals, and that construction commenced shortly thereafter.[70] It is also undisputed that defendant Koepke's tower on North School Road was concrete and actual and municipal defendants were using it for free when plaintiffs filed their complaint in the case at bar on October 16, 1995.[71]

Plaintiffs submitted evidence from a certified appraiser that the illegal construction of a commercial radio tower across the street from their property on North School Road, in August/September 1986, caused the value of their property to drop by 50%.[72] See appraiser's report page 2, (R 36 Ex. 2) (App 434):

> In my opinion the MARKET VALUE of this property as of the August/September 1986 time frame is as follows:
>
> $47,000 ..... with commercial tower in place
> $94,500 ..... with no tower

The tower was the *proximate* cause of the decline in market value of plaintiffs' property.[73] Constructing and

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[70]R 34 Material fact # 3, (App 176)

[71]R 36 Ex. 1 Koepke Deposition pg 65

[72]Plaintiffs claim treble damages for all injuries to property or business incurred since August 12, 1986 See 89 ALR Fed. 887.

[73]Not only did the tower directly reduce the market value of plaintiffs' property as raw land, it effectively nullified

operating the tower in violation of the zoning regulations was the goal of the conspiratorial agreement between municipal defendants and defendant Koepke.

Furthermore, it was reasonably forseeable that the tower would adversely affect nearby property values. See final comments of appraiser (R 36 Ex. 2) (App 442):

> [The tower] is perceived as a negative by the public. Even if not always visible the public is still aware of it's existence thus affecting value. .. This loss of value is described as Economic Obsolescence (also called locational and environmental obsolescence.)

That towers would be perceived as a negative by the public was especially forseeable in Coventry in 1986, - only a year after the same neighbors had prevailed in a three year legal battle over a microwave tower in virtually the *same spot.*[74]

The district court reasoned, however, that because the plainitffs did not sell their property and the defendants moved the tower to the Coventry Town Hall *after* plaintiffs filed suit,[75] either i) the injury to property never happened. "[t]he alleged loss in the value of the property would obtain

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development potential, causing injury to property in the form of lost profits. See final comments of appraiser *"Development of this parcel or any part thereof would be a risky undertaking with the tower situated the way it is."* (R 36 Ex.2) (App 442) Injury to plaintiffs' property in form of lost profits is not pure speculation. A 43 acre parcel located approx. one mile from plaintiffs' property was subdivided in 1989 into 9 lots. Betwee 1989 and 1994 eight of those lots sold for a total of $546,200. (R 55 exhibit 16-1)

[74]R 36 Ex. 7 deposition exhibits 3,4, and 5 (App 449-453)

[75]R 38 Exhibit 1 Koepke affidavit.

only in the event the plaintiffs sold or attempted to sell the property." or ii) the injury to property might have happened but "the alleged injuries are too speculative" or iii) the injury to property did happen but it was "a transient condition" and "there is no cause of action for a temporary diminution of a property's value." or iv) all of the above. Ruling p. 18 (App 360)

i) The injury to property did happen.

The district court cites no authority for its conclusion that property is not injured until it is sold. Plaintiffs maintain that real property is injured when the act that lowers value occurs, regardless of when, or if, it is sold.[76]

ii) The injury to property was concrete and actual.

The district court cites Oscar v. University Students Co-Operative Assoc., 965 F.2d 783 (9th Cir. 1992) cert denied, 506 U.S. 1020, 113 S.Ct. 655, 121 L.Ed.2d 581 (1992) in support of its conclusion that the alleged injury to plaintiffs' property value is too speculative. Oscar, however, is distinguishable. In Oscar the plaintiffs rented an apartment in Berkeley, California near a large apartment complex managed by the defendants. The residents in the defendants' apartment complex collectively agreed to allow drug dealing out of the complex. For twenty years the defendants' apartment complex functioned more or less as a drug cooperative, employing at least nineteen drug dealers at one point. When Oscar moved into the neighborhood, she found that the violence, garbage, noise, urinating on cars,

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[76]'Injure' as applied to things "*implies an act that lowers value.*" See American Heritage Dictionary (Second College Edition)

and disposing of bodies nearby, caused her to enjoy her apartment less than she expected. Oscar filed suit under RICO alleging a "decrease in the value of her property" due to the racketeering activity next door. The Ninth Circuit affirmed the district court's dismissal pursuant to Rule 12(b)(6) for failure to state a claim.[77]

The Ninth Circuit observed that Oscar did not own the property she claimed was devalued.

> Oscar rents an apartment in the city of Berkeley. She does not own the property on which she lives; her property interest in the land is a leasehold interest. *Although one might measure an owner's loss by the diminution in fair market value, the same cannot be said for a renter. (emphasis added)*

Id. at 786

Plaintiffs, here, *own* the subject property on North School Road. The measure of plaintiffs' loss is the diminution in fair market value by $47,500. Plaintiffs' evidence is from a highly qualified source - a certified appraiser - whose qualifications and credibility are unchallenged by defendants. There is no evidence in the record from *any* competent source to controvert the opinion of plaintiffs appraiser.

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[77]In the case at bar, the district court *denied* defendants' Rule 12(b)(6) motions to dismiss for failure to state a claim, in which the defendants relied on Oscar to argue that plaintiffs' injuries were too speculative to confer standing. See Defendant Koepke's Motion to Dismiss for failure to state a claim (R 20 pgs. 16-18) and Plaintiffs' Objection dated November 25, 1996 (R24 pgs 18-20)(App 76-78)

It is the district court, improvising as defendants' expert witness, that is speculating about the devaluation of plaintiffs' property. The fact that defendant Koepke moved his tower to the Coventry Town Hall after plaintiffs commenced the instant action says nothing about the validity of the appraisal.

iii) Voluntary cessation of allegedly illegal conduct by the defendant does not deprive the plaintiffs of standing.

The conduct of defendants *after* plaintiffs filed their complaint was, for obvious reasons, not addressed *in* the complaint, and is not particularly relevant except insofar as it proves that municipal defendants had feasible and lawful alternatives to accepting $2800 per month in free radio service from defendant Koepke.

Nevertheless, in it's analysis, the district court focused on the fact that defendant Koepke voluntarily moved the tower to the Coventry Town Hall after plaintiffs filed suit[78] and concluded that the diminution in property value was a "transient condition"[79] and that "There is no cause of action for a temporary diminution of a property's value" Ruling p. 18. (App 360)

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[78]Defendants did not actually renounce their illegal purpose after plaintiffs filed suit, (as renunciation is defined in the Connecticut Penal Code, § 53a-10) they simply shifted the locus of their activities to the Town Hall and away from the Oygards.

[79]The tower was situated on North School Road for ten years, from September 1986 until August 1996. Ten years is not 'transient'. See American Heritage Dictionary (Second College Edition). "In modern usage transient refers to what literally remains only a short time, such as a guest at a hotel. It can also mean inherently short-lived or impermanent."

There is no question but that "Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation." NOW v. Scheidler 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994), but it is also a matter of settled law that, as a general rule, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine a case." U.S. v. W.T. Grant 345 U.S. 629, 631, 73 S.Ct. 849, 97 L.Ed. 1303 (1953) See also Gray v. Sanders, 372 U.S. 368, 375, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) "Voluntary abandonment of a practice does not relieve a court of adjudicating its legality."

Nor do exceptions to the general rule apply. In view of the fact that defendant Koepke's tower was not the first tower in the area to be the subject of a lawsuit, and that municipal defendants have a ten year history of not bestirring themselves to seek legal advice about the propriety of accepting benefits from zoning violators (See footnote 44 above), there is a "public interest in having the legality of the practices settled." U.S. v. W.T. Grant, *supra*, at 632. It can be seen from a topographic map[80] that plaintiffs' property is situated near a high point in town, (Grant Hill at 934 feet), which is why both defendant Koepke in 1986 and United States Transmission Service in 1982 sought to build a commercial tower in the area. As long as it is easier to secure the cooperation of the Coventry Town Council for $2800 per month than move Grant Hill into a commercial zone where towers are a permitted use, there is a reasonable expectation that the wrong will be repeated.

Furthermore, plaintiffs seek treble damages under 18 U.S.C § 1964(c). It would frustrate the purpose of RICO if a defendant could unilaterally decide not to be liable for treble damages by restoring the value of injured property *after* a plaintiff raises a RICO claim. "The courts have rightly

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[80]R 36 Ex. 2 Appraisal pg. 13 (App 445)

refused to grant defendants such a powerful weapon against public law enforcement." U.S. v. W.T. Grant supra at 633.

Finally, Fact #6 in plaintiffs' Rule 9(c)(2) statement of material facts[81] reads "Plaintiffs were injured in thier business or property as a result of the actions of one or more of the defendants" The defendants produced no rebuttle evidence, as required by Rule 56(e) and Local Rule 9(c)(1), to even raise an issue of material fact.[82]

6. DID THE DISTRICT COURT CORRECTLY CONCLUDE THAT PLAINTIFFS' REMAINING ARGUMENTS WITH RESPECT TO THE RICO CLAIM HAVE NO MERIT?

It did not. See plaintiffs' Motion for Summary Judgment Memorandum of Law R 34 pages 24-37 for de novo review. (App 209 et. seq.)

7. DID THE DISTRICT COURT CORRECTLY RENDER SUMMARY JUDGMENT IN FAVOR OF MUNICIPAL DEFENDANTS ON MUNICIPAL DEFENDANTS' COUNTERCLAIM?

The district court did not correctly render summary judgment in favor of municipal defendants on the counterclaim.

i) The district court erred in rendering summary judgment without explanation.

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[81]R 34 Appendix A (App 176)

[82]See Local Rule 9(c)(1) All material facts set forth in said statement will be deemed to be admitted unless controverted by the statement required to be served by the opposing party in accordance with Rule 9(c)(2).

In Carter v. Stanton, 405 U.S. 669, 92 S.Ct. 1232, 31 L.Ed.2d 569 (1972), the Supreme Court vacated the district court's order granting summary judgment because the order was "opaque and unilluminating as to either the relevant facts or the law with respect to the merits of appellants' claim." Id. at 669

In the case at bar, the opinion of the district court is more than opaque; it is non-existent, like the opinion rendered by the district court for the District of New Mexico in U.S. v. Continental Oil, 377 U.S. 161, 84 S.Ct. 1155, 12 L.Ed.2d 213 (1964). In Continental Oil, the district judge entered summary judgment "without opinion, findings of fact, or conclusions of law of any kind" and then died. Id. p. 161. The Supreme Court vacated and remanded, granting leave for the moving party to renew its motion for summary judgment before another district judge, and making it clear that if summary judgment were granted again the district court would be expected to disclose its reason.

> "If summary judgment were again granted, *the District Court would be expected to furnish a statement of its reasons, including such findings of fact and conclusions of law as might be appropriate. (emphasis added)*

Id. p. 162

In the case at bar, summary judgment in favor of municipal defendants on their counterclaim should be vacated, if for no other reason, because the district court failed to furnish a statement of its' reason.

ii) Based on the Local Rule 9(c)(2) statements of undisputed material facts, summary judgment should have been entered in favor of plaintiffs (counter-defendants).

Aside from it being settled law in all civilized countries that a contract to do an illegal act or to aid another in violating the law is void and unenforceable as against public policy, McConnell v. Commonwealth Pictures Corp. 7 N.Y.2d 465, 166 N.E.2d 494 (1960); and aside from it be settled law that releases fraudently obtained are void, Dice v. Akron, Canton & Youngstown R.R. 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952); the undisputed material facts of this case lead to the inevitable conclusion that there was an anticipatory breach of contract by municipal defendants long before plaintiffs commenced the instant action in October 1995. The following material facts from the Rule 9(c)((2) statements of material facts are undisputed:

From Plaintiffs' (Counter-Defendants) Rule 9(c)(2) Statement of Material Facts (R 33)(App 289):

1) The 'other good and valuable consideration' specified in the release is the agreement by the Town of Coventry to take appropriate legal action against Mr. Koepke to seek removal of the radio tower in accordance with ¶ 3 of the written "Resolution Authorizing Settlement of Claim Against the Town of Coventry by Susan and Norvald Ogyard" appended to plaintiffs' Amended Complaint as Exhibit B.

3) The actions of municipal defendants at all times, until plaintiffs filed their complaint in the case at bar, unequivocally manifested an intent to renege on ¶ 3.[83]

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[83]In the document entitled 'Municipal Defendants Rule 9(c)(2) Statement of Material Facts as to Which a Genuine Issue Exists" (R 45) (App 321) municipal defendants do dispute Fact #3, above, but they do not produce any rebuttle evidence as required by Rule 56(e). Mere allegations or

From Municipal Defendants (Counter-claimants) Rule 9(c)(2) Statement of Material Facts (R 41):

29) The plaintiffs learned on March 12, 1990 that the Town did not intend to initiate an enforcement action against Koepke. (In their Fact #29 municipal defendants cite plaintiffs' Amended Complaint Count Two ¶s 66-68 as being undisputed.)

¶s 66-68 of plaintiffs' Amended Complaint Count Two (R 18) (App 43-44) read as follows"

¶ 66 On December 11, 1989 plaintiff Susan Oygard discovered that the defendant Town of Coventry was using Koepke's tower. Until then defendant town officials had fraudently indicated to plaintiffs they didn't know who was using defendant Koepke's tower.

¶ 67 On March 12, 1990, plaintiff Susan Oygard attended an executive session of the finance committed of the Coventry Town Council. Defendants Lewis, Elsesser and Koepke were present at said executive session. Oygard's neighbor Jim O'Connor was also present. No attorneys were present.

¶ 68 At said March 12, 1990 meeting, defendants Lewis and Elsesser admitted the Town was using Koepke's North School Road tower. Defendants Lewis and Elsesser both indicated that the Town would continue to do so regardless of the outcome of Oygard's appeal to the appellate court. When Oygard pointed out the town had

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denials do not suffice to defeat a motion for summary judgment. See D'Amico v. City of New York, 132 F.3d 145 (2d Cir. 1998) "The non-moving party may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence showing that its version of events is not wholly fanciful."

agreed to seek an injunction for removal of the tower according to the agreement in the Resolution cited in ¶ 63 above, defendant Lewis told Oygard the town would simply renege on that agreement.

As a matter of law, municpal defendants breached a material term of the contract on March 12, 1990. "Anticipatory breach of contract occurs when a party communicates a definite and unequivocal manifestation of intent not to render the promised performance at the contractually agreed upon time." Koski v. Eyles, 37 Conn. Sup. 861, 863 An anticipatory breach of contract is a total breach of contract excusing the other party to the contract from further performance. Martin v. Kavanewsky 157 Conn. 514, 519 (1969)

A point of contention is the interpretation of the following conditional phrase (drafted by the town attorney) from ¶ 3 of the Resolution[84]:

> [i]f the appeal of the decision by Judge Vasington in the case entitled Koepke vs. Coventry Zoning Board of Appeals, et.al., Superior Court Tolland County, Docket No. CV , is successful before the Appellate Court, and that Appellate Court agrees that the zoning permit issued by the town of Coventry Zoning Agent was improperly issued, and is no longer valid, and further that the tower erection is in violation of the Coventry Zoning Regulations, ...

Municipal defendants (counter-claimants) argue the phrase is unambiguous. Plaintiffs (counter-defendants) maintain the

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[84]See municipal defentants motion for summary judgment (R 42) pgs. 34-36 and plaintiffs objection (R 48) pgs. 18-21 (App 321-323)

phrase is ambiguous because the merits of the ZBA decision to revoke defendant Koepke's zoning permit were not at issue before the Appellate Court in the appeal of Judge Vasington's decision.

It is unnecessary to resolve the issue, however, because municipal defendants admit they expressly repudiated the contract on March 12, 1990 - before the Appellate Court did anything.[85]

See also Municipal Defendants' Motion for Summary Judgment (R 42) pg. 5:

> *"Lastly, it is undisputed that on December 11, 1989, the plaintiff learned by reading a newspaper article that the Town was using Koepke's tower and that on March 12, 1990, she learned that the Town did not intend to initiate an enforcement action for removal of the tower."*

It was municipal defendants, not the plaintiffs, who breached the contractual agreement between the Town of Coventry and the Oygards.

IX. CONCLUSION

Plaintiffs respectfully request this Court to reverse the judgment entered herein with a finding of fact in favor of plaintiffs and to direct the district court to enter summary judgment in favor of plaintiffs on all federal law claims, and in favor of plaintiffs (counter-defendants) on the counterclaim, and to remand the remaining state law claims back to the Superior Court for the Judicial District of Tolland at Rockville, Connecticut.

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[85]The appellate court did not render a decision until 1991. See Koepke v. ZBA 25 Conn. App. 611 (1991) Exhibit 3 to Municipal Defendants' Motion for Summary Judgment (R42)

Koepke v. Zoning Board of Appeals et. al.

filed October 2, 1986
decided: August 2, 1994
230 Conn. 452

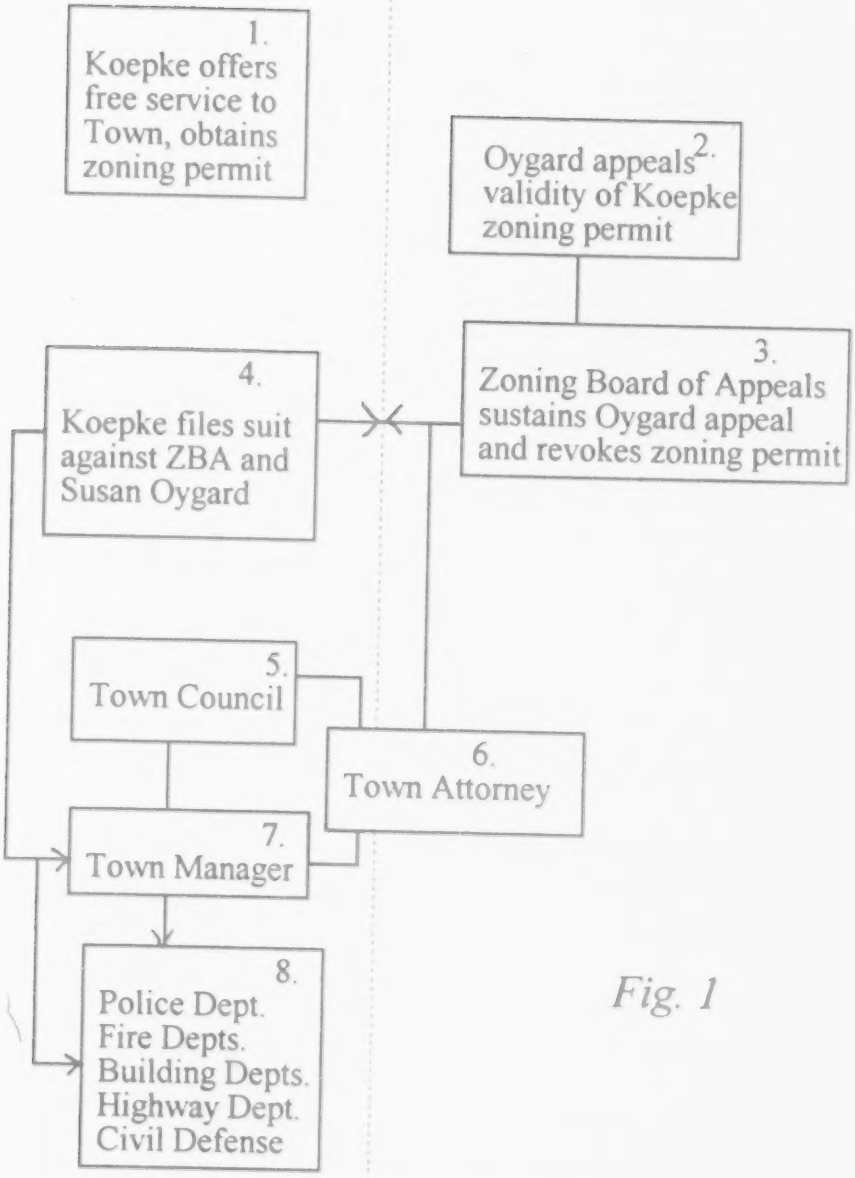

Fig. 1

Fig. 1

Notes:

1. See Koepke Responses to Interrogatories dated July 10, 1996, Interrogatory #2 (Plaintiffs' Motion for Summary Judgment Exhibit 6):

Question: [w]hen was that offer made and to whom was that offer made? Who do you have reason to believe was aware of that offer?

Answer In June 1986, Mr. Koepke extended an invitation to the highway department (Roger Bellard), the fire departments (Michael LaChappel and David Donohue) and the Tolland 911 center (Jeffrey Vannais) that they could utilize the tower. The then town manager (Harold Hodge) was aware of these offers.

2. "On August 12, 1986, Oygard appealed to the board challenging the validity of the August 7, 1986 permit on the grounds that its issuance adversely affected her property and that the radio tower was not permitted by the applicable zoning regulations." Koepke v. Zoning Board of Appeals 230 Conn. 452, 454 (1994)

3. "After a public hearing, the board voted to sustain Oygard's appeal and revoked the permit that had been issued to the plaintiff [Koepke] on August 7, 1986." Id.

(Note: the ZBA, like the Town Council, is elected, not appointed. See Coventry Town Charter Chapter IV. OTHER ELECTIVE OFFICES § 4-1 ZONING BOARD OF APPEALS. "There shall be five (5) members of the zoning board of appeals and three (3) alternate members of the zoning board of appeals, whose term of office shall be for two (2) years.) (Plaintiffs' Mot. for SJ Exhibit 28)

4. Failing to get a restraining order pursuant to 8-8(g) to stay the decision of the ZBA, Koepke proceeded with construction and operation of the tower without court authority, securing the cooperation of the Town Council and Town Manager by giving the Town free service See Plaintiffs' Mot. for SJ Exhibit 1, Koepke Deposition, pgs 63-64:

> Q. Did you meet with the Town Council?
> A. I don't believe so. I try not to meet with those people.
> Q. I thought they were your friends.
> A. Well, I mean I deal with the Town Manager. He is their representative.

5. Town Council

Town Charter § 2-1A: At the meeting of the electors of the Town of Coventry for the election of municipal officers, there shall be elected seven (7) members of the town council.

Town Charter §6-1: The council shall appoint, for an indefinite term, and may remove, a town manager.

Town Charter §5-10: The council shall engage a town attorney to serve at its discretion...

6. Town Attorney

Town Charter §5-10: [The town attorney] shall appear for and protect the rights of the town in all actions, suits or proceedings brought by or against it or any of its officers or agencies. He shall be the legal advisor to all town officers, or agencies, in all matters affecting the town and shall upon written request, furnish them with a written opinion on any

question of law involving their respective powers and duties. ... He shall have the power, with the approval of the council, to compromise or settle any claims by or against the town. The town manager shall be the sole contact to employ the services of the town attorney for any board, agency, commission or officer. Nothing herein shall be construed to prevent the hiring of other counsel by the town council when deemed necessary.

7. Town Manager

Town Charter § 6-2: The town manager shall be directly responsible to the council for the administration of all offices and agencies in charge of persons appointed by him and shall supervise and direct the same. He shall be the Chief Executive Officer of the town as defined by Section 7-193 of the Connecticut General Statutes. He shall be the purchasing agent of the town subject to such rules and regulations as shall be prescribed by the council.

8. Offices supervised and directed by the Town Manager

Town Charter § 5-1: The town manager, with the approval of the council, shall appoint the following offices: town clerk, tax collector, assessor, director of civil defense, building official, canine control officer, tree warden, chief of police, fire marshalls, treasurer, assistant treasurer, human services administrator, ...

Supreme Court, U.S.
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No. 98-1327

In The
Supreme Court Of The United States
October Term, 1998

SUSAN OYGARD and NORVALD OYGARD,
Petitioners,

v.

TOWN OF COVENTRY, COVENTRY TOWN COUNCIL, JOAN LEWIS, JOHN ELSESSER, RICHARD ASHLEY and ALAN KOEPKE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S, ALAN KOEPKE'S, BRIEF IN OPPOSITION

Counsel of Record:
DUNCAN J. FORSYTH, ESQ.
JOHN B. FARLEY, ESQ.
HALLORAN & SAGE LLP
One Goodwin Square
225 Asylum Street
Hartford, Connecticut 06103
Tel. (860) 522-6103
Fax (860) 548-0006

Attorneys for the Respondent:
Alan Koepke

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STATEMENT OF THE CASE

I. Nature of Case and Proceedings

This case arises out of a decision by the zoning enforcement officer for the defendant Town of Coventry ("Town") in 1986 to issue a zoning permit to defendant Alan Koepke ("Koepke") for construction of a radio communications tower across the street from undeveloped property owned by the plaintiffs Susan Oygard and Norvald Oygard ("Oygards"). Following issuance of the permit, Koepke constructed the tower. The enforcement officer's decision was then reversed by the Zoning Board of Appeals ("Board"). However, eight years of appeals in Connecticut courts by Koepke and the Oygards established that the Board did not provide the requisite statutory notice necessary to render its original decision. The matter was ultimately remanded back to the Board for a new hearing in 1995. The Board then found that the zoning permit should not have been issued. Koepke appealed this decision, but took the tower down and sold the property in 1996.

The Oygards brought this action in state court seeking relief pursuant to the civil rights act, 42 U.S.C. § 1983, and state law. The case was removed to the federal district court for the District of Connecticut and the Oygards amended their complaint to add a count pursuant to RICO, 18 U.S.C. § 1962, as well as another state law claim. The Town filed a counterclaim for breach of contract.

The Oygards, the Town and Koepke all moved for summary judgment. The District Court (Squatrito, J.) denied the Oygards' motion for summary judgment on their § 1983 and RICO claims, and granted summary judgment to the Town and Koepke dismissing the federal claims. Having dismissed all federal claims, the District Court declined to

exercise jurisdiction over the Oygards' supplemental state law claims. (Ruling, Oygard Appendix p. 14).

The Court of Appeals for the Second Circuit in a Summary Order upheld the District Court stating that the granting of summary judgment for the defendants was appropriate "for substantially the reasons stated in [the district] court's opinion." (Summary Order, Oygard Appendix p. 20). The Appellate Court found however, that while the District Court properly declined to exercise jurisdiction over plaintiffs' state law claims, it should have remanded them back to the state trial court.

II. Statement of Facts

The underlying dispute giving rise to this appeal concerns a zoning matter. Koepke is engaged in the business of radio communications, and provides service to fire and police departments and other municipal entities. In 1986, Koepke was issued a zoning permit by the zoning enforcement officer of the Town for construction of a telecommunications tower on land he owned on North School Road in Coventry, Connecticut. After being issued the permit, Koepke constructed the tower. The Oygards, who own property on North School Road have taken the position that construction and operation of the tower violated the Town's zoning regulations and state law.

This dispute has been litigated in the state and federal courts and before the Board since 1986. The complicated procedural history of litigation surrounding the tower is set forth in the District Court's findings of fact and is necessary to provide the context for the issues raised in this petition.

(Oygard Appendix p. 2-3). The tower was ultimately dismantled on August 6, 1996. (Koepke App. p. 3).[1/]

The Amended Complaint contains four counts, two of which raise federal claims and are in issue in this petition. In the First Count, which alleges a claim under 42 U.S.C. § 1983, plaintiffs argue that the defendants "conspired to violate the zoning laws of the State of Connecticut . . . and the zoning regulations of the Town . . . ." The articulated basis of the supposed conspiracy is that the Town allegedly allowed Koepke to unlawfully build and operate the tower in exchange for free communications services.

Koepke has testified that there was never an agreement between him and the Town whereby he would provide free use of the tower in exchange for no enforcement of zoning laws. (Koepke App. p. 3). In fact, Koepke provided free antenna space to all of the ten municipalities which utilized his four towers in eastern Connecticut. (Koepke App. pp. 2-3, 6-9). The Town paid for all equipment which it used on the tower as well as electric and telephone services related to its use. (Koepke App. p. 4). The Town installed its equipment on the tower only after a state judge ruled in 1989 that the Board had no jurisdiction to overturn Koepke's permit.

In the Fourth Count, plaintiffs allege a violation of RICO. The basis of this claim is that Koepke allegedly

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1/ References to "Koepke App." refer to the respondent's appendix which was filed with the Second Circuit Court of Appeals. Pages 1-4 consisted of an affidavit from Alan Koepke, dated March 31, 1997. Pages 5-9 were from the deposition transcript of Alan Koepke, dated January 27, 1997. Pages 10-28 were from the deposition transcript of Susan Oygard, dated January 15, 1997.

bribed municipal officials by conferring upon them free antenna space in exchange for their decision not to enforce the zoning regulations. Koepke testified that there never was such an agreement, and that he provides free services to all municipalities which desire to utilize his various towers in eastern Connecticut. (Koepke App. pp. 1-3, 6-9). Susan Oygard testified that she had no direct evidence of such an agreement, but it was "implicit" from the Town's receipt of free service. (Koepke App. p. 19). According to the Oygards, the decision by the Town to use the tower "was necessarily a decision not to enforce the zoning regulations of the Town of Coventry and the state statutes . . . ." (Oygard App. pp. 40).

The Oygards own approximately 40 acres of undeveloped land on North School Road, a portion of which is across the street from the tower site. They placed this land in a tax relief program for open space shortly after they purchased it. (Koepke App. pp. 15-16).

The Oygards never listed the property with a real estate agent, never contacted an engineer regarding subdivision, never spoke to an attorney about subdivision, never tried to subdivide the property and never obtained any contract for the sale of any portion of the property. (Koepke App. pp. 13, 18).[2/]

After the tower was constructed, a large home of substantial value was constructed on land directly abutting the tower site. (Koepke App. pp. 22-24).

2/ Plaintiffs only spoke with an appraiser shortly before the damages analysis was filed in the district court in June, 1996. (Koepke App. pp. 13-15).

REASONS FOR DENYING WRIT

I. Plaintiffs Seek to Involve this Court in the Adjudication of State Law Claims and the Interpretation of State Rules and Statutes Relating to Procedural Matters

The plaintiffs claim that the "most striking departure from the accepted and usual course of judicial proceedings is the disposition of the counterclaim by the courts below." (Oygard Petition p. 14). This counterclaim deals with the Oygards' breach of an agreement which they entered into with the Town and is purely a state law claim. The District Court, after ruling on the federal claims, declined to exercise jurisdiction over the remaining state law claims. (Ruling Oygard App. p. 14). Since this is entirely a state law contract claim it does not merit review by this Court.

The plaintiffs also claim to have been deprived of certain property interests allegedly created by Conn. Gen. Stat. §§ 8-7 and 8-8. Notwithstanding the plaintiffs' unique interpretation of state zoning statutes there is no need for this Court to involve itself in the interpretation of the procedural stay provisions of state zoning statutes.

II. Plaintiffs Now Raise Claims Not Raised in Their Complaint or Summary Judgment Motion

The Oygards have also raised the following issues in their Petition: (a) whether alleged racketeering by public officials gives rise to substantive due process claims (Oygard Petition p. 23); and (b) whether a classification scheme was created based on alleged racketeering activity which, in effect, denied them equal protection (Oygard Petition p. 25).

These are issues not raised by the Oygards in either their amended complaint or their summary judgment motion. Thus, such claims cannot be raised for the first time before this Court.

III. State Procedural Rules Do Not Equate to Federal Property Rights

Even if the Oygards were correct in their interpretation of procedural stays such as those set forth in Conn. Gen. Stat. §§ 8-7 and 8-8 and Conn. Rules of Appellate Procedure § 4046 these do not raise to the level of federally protected property interests. See, Olim v. Wakinekona, 461 U.S. 238, 250-51, 103 S. Ct. 1741, 75 L.Ed 2d 813 (1983); Hewitt v. Helms, 459 U.S. 460, 471, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983); West Farms Associates v. State Traffic Commission, 951 F.2d 469, 472-73 (2d Cir. 1991), cert denied, 503 U.S. 985 (1992).

IV. The Plaintiffs Alleged Loss is Far Too Speculative to Provide Them Standing to Assert a RICO Claim

The plaintiffs' reckless allegations of conspiratorial and criminal conduct involving Koepke, members of the Coventry Town Council, the Town Manger and the Chief of Police continues in their Petition to this Court. However, these reckless allegations now include the District Court and Court of Appeals, who plaintiffs claim have provided a "blueprint" for the future engagement of such conduct. (Oygard Petition p. 20).

In order to have standing under RICO a person must have sustained an injury "in his business or property by reason of a violation of Section 1962 of this chapter," 18 U.S.C. § 1964(c). The only allegation that plaintiffs have

made is that their property was "devalued" as a result of the alleged racketeering activities. (Amended Complaint, Fourth Count, Oygard App. p. 41). This falls far short of the required allegation that the plaintiffs have suffered a tangible financial loss which was caused by the alleged co-conspirators.

Deposition testimony revealed that plaintiffs never made any effort to subdivide or sell their property at any time after the tower was erected in the summer of 1986. In fact, plaintiffs placed their property into the Connecticut program which provides for tax relief for open space property, shortly after they purchased it in 1979 or 1980. (Koepke App. pp. 15-16). They only spoke with an appraiser shortly before the damages analysis was filed in the District Court in conjunction with this litigation in June, 1996. (Koepke App. pp. 15-18). This occurred approximately ten years after the tower was constructed, and only about three months before Koepke tore it down [3/]

Both the amended complaint and deposition testimony established that the plaintiffs have not alleged or shown that they attempted to sell their property or that the perceived devaluation injured them in any way.[4/]

3/ The plaintiffs always possessed the right to institute an injunction action to seek removal of the tower but elected not to. See, Cummings v. Tripp, 204 Conn. 67, 75, 527 A.2d 230, 241 (1987); Blum v. Lisbon Leasing Corp., 173 Conn. 175, 180, 377 A.2d 280, 282 (1977).

4/ After the tower was constructed, a large home of substantial value (perhaps $500,000) was constructed on land directly abutting the tower site. (Koepke App. pp. 19-21).

"Devaluation" of property only becomes a concrete injury when property offered is for sale, subdivided or refinanced - none of which happened in this case. Thus, plaintiffs have failed to allege or show the requisite concrete financial loss to confer standing under RICO. The lack of an allegation or evidence that plaintiffs suffered any actual loss has been and continues to be fatal to their RICO claim. The District Court relied on an analogous case, Oscar v. University Students Co-Operative Association, 965 F.2d 783 (9th Cir. 1992) cert. denied 506 U.S. 1020, (1992) and the Second Circuit agreed with this reasoning. Plaintiffs have pointed to no cases which support their position on this issue.

CONCLUSION

The Respondent, Alan Koepke, respectfully submits that the plaintiffs have failed to demonstrate a basis for the Court to exercise its judicial discretion to grant the Petition for Writ of Certiorari. The Second Circuit Court of Appeals properly applied the law and its decision in no way conflicts with applicable decisions of this Court or any other Court of Appeals.

The Respondent, Alan Koepke, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted

By _____

Duncan J. Forsyth
John B. Farley
Counsel of Record of
HALLORAN & SAGE LLP
One Goodwin Square
225 Asylum Street
Hartford, CT 06103
Tel No. (860) 522-6103
Fax No. (860) 548-0006

Attorneys for the Respondent
Alan Koepke

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No. 98-1327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

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Petitioners,

v.

TOWN OF COVENTRY, COVENTRY TOWN COUNCIL, JOAN LEWIS, JOHN ELSESSER, RICHARD ASHLEY and ALAN KOEPKE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS R. GERARDE
Counsel of Record
HOWD & LUDORF
Attorneys for Respondents Town of Coventry, Coventry Town Council, Joan Lewis; John Elsesser and Richard Ashley
65 Wethersfield Avenue
Hartford, Connecticut 06114-1190
(860) 249-1361

151873

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

1. Did the respondents deny the petitioners due process of law in violation of the Fourteenth Amendment?

2. Did the respondents deny the petitioners equal protection of the law in violation of the Fourteenth Amendment?

3. Did the courts below correctly conclude that petitioners lacked standing to raise a RICO claim?

4. Did the courts below correctly remand the case to the District Court, so the District Court could in turn remand the pendant state law claims to the Connecticut State Court?

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APPENDIX

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Appendix A — Affidavit Of Alan J. Koepke 1a

STATEMENT OF THE CASE

In 1986 co-defendant Alan Koepke (hereinafter "Koepke"), purchased a parcel of land located across the street from the Oygards' property in the Town of Coventry. Petitioners' App. 25. The Town of Coventry, through its Zoning Officer, Robert Eisner (hereinafter "Eisner"), issued a permit to Koepke on August 7, 1986, allowing Koepke to erect a telecommunications tower on his property. Petitioners' App. 25. On August 12, 1986, plaintiff Susan Oygard challenged the issue of the permit by appealing to the Coventry Zoning Board of Appeals (hereinafter "ZBA"). Petitioners' App. 26.

On September 16, 1986, the ZBA sustained Oygard's appeal and ordered Eisner to revoke Koepke's permit. Petitioners' App. 26. Eisner issued Stop Work Orders on September 18, 1986 and on September 26, 1986. Petitioners' App. 27. In response, codefendant Koepke exercised his right under Conn. Gen. Stat. § 8-8 and, on October 2, 1986, appealed the ZBA's ruling to the Connecticut Superior Court. Petitioners' App. 27-28.

While Koepke's appeal of the ZBA ruling was pending, he sued the Town of Coventry for money damages and injunctive relief, to prevent the Town from interfering with construction and utilization of his telecommunications facility. Petitioners' App. 29. On September 26, 1986 Koepke prevailed on his appeal of the ZBA ruling; the Connecticut Superior Court held that Koepke's permit should be reinstated. Petitioners' App. 29. The Town of Coventry thereafter exercised its discretion in deciding not to spend further taxpayer dollars by appealing the Trial Court's ruling. Petitioners' App. 29-30. The Oygards, however, appealed the Trial Court's decision. Petitioners' App. 30.

The Connecticut Appellate Courts sustained the Superior Court ruling, holding that the ZBA lacked jurisdiction due to inadequate notice. *Koepke v. Zoning Board of Appeals*, 25 Conn. App. 611, 595 A.2d 935 (1991). The Oygards appealed to the Connecticut Supreme Court, which also held that the ZBA lacked jurisdiction to hear her appeal since public notice of the hearing was insufficient. *Koepke v. Zoning Board of Appeals*, 233 Conn. 171, 610 A.2d 1301 (1992). The Connecticut Supreme Court remanded so that the Connecticut Appellate Court could determine if Susan Oygard's appeal to the ZBA was timely, in which case a new hearing would be held. On remand, the Connecticut Appellate Court held that Susan Oygard's appeal to the ZBA was not timely. *Koepke v. Zoning Board of Appeals*, 30 Conn. App. 395, 620 A.2d 811 (1993). On appeal, the Connecticut Supreme Court reversed, holding that Susan Oygard's appeal was timely, and remanded the case to the Zoning Board of Appeals for a new hearing. *Koepke v. Zoning Board of Appeals*, 230 Conn. 452, 645 A.2d 983 (1994).

In June 1995 the ZBA voted to sustain Susan Oygard's appeal from the issuance of the 1986 zoning permit. Petitioners' App. 31. Koepke appealed this decision to the Superior Court. Petitioners' App. 31. While the appeal was pending, on August 6, 1996, Koepke took down the subject communications tower and thereafter sold his property. Respondents' App. 3.

The respondents specifically deny petitioners' statement on page 6 of the petition that co-defendant Koepke constructed his radio tower "with the cooperation of the Coventry Building Inspector." In fact, after the Coventry Zoning Board of Appeals voted to revoke Koepke's zoning permit for the subject tower, Coventry building official John Wilnauer issued a "Stop Work Order" for Koepke's building permit. Petitioners' App. 27.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS PROPERLY REMANDED THE CASE TO THE DISTRICT COURT SO THAT STATE LAW CLAIMS COULD BE REMANDED TO STATE COURT.

The Court of Appeals for the Second Circuit has not departed from the accepted and usual course of judicial proceedings or sanctioned such a departure so as to call for an exercise of this Court's supervisory power. Specifically, the Court of Appeals did not depart from the accepted and usual course of judicial proceedings in its handling of the disposition of the counterclaim by the District Court. The Court of Appeals, in its ruling on the Oygards' appeal, noted that the District Court's decision to decline to exercise jurisdiction over the plaintiffs' state law claims once judgment had entered against the plaintiffs on the federal claims was proper. This finding was legally correct. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988); *DeLaura v. Power Authority of New York*, 982 F.2d 73, 80 (2d Cir. 1992). The reason the Court of Appeals remanded the case to the District Court was that the District Court dismissed the pendant state law claims, when it should have remanded them to the Connecticut Superior Court. *See Carnegie-Mellon Univ. v. Cohill*, *supra* at 357. The Court of Appeals further noted that it was unclear from the record whether the District Court ruled on the Town of Coventry's Motion for Summary Judgment on its counterclaim. The lack of clarity stems from the facts that the District Court's Order granting summary judgment could arguably have extended to the defendant's counterclaim; however, ruling on the counterclaim would have been contrary to the court's stated intention to decline to exercise jurisdiction over state law claims.

II.

CONTRARY TO THE PETITIONERS' CLAIM, THE COURT OF APPEALS DID NOT ISSUE A RULING ADDRESSED TO "AN IMAGINARY COMPLAINT."

The petitioners claim the Court of Appeals departed from the accepted and usual course of judicial proceedings by issuing a ruling addressed to "an imaginary complaint." There is little question, however, that the District Court focused on the plaintiffs' amended complaint dated October 30, 1996, beginning at Oygard App. 23, when ruling that the Oygards' substantive due process, procedural due process, and equal protection rights had not been violated. Similarly, the Court of Appeals recognized the District Court had analyzed the plaintiffs' federal claims, and concluded it could add little to the District Court analysis. Oygard App. 20.

Even if, as petitioners claim, the court should have analyzed whether petitioners had a property interest in the utilization of the appeal procedures and Conn. Gen. Stat. § 8-7 and § 8-8, the result below would have been the same. In relevant part § 8-7 provides as follows:

> An appeal [to the Zoning Board of Appeals] shall not stay any such order, requirement or decision which prohibits further construction or expansion of the use in violation of such zoning regulations except to such extent that the Board grants a stay thereof. An appeal from *any other order, requirement or decision shall stay all proceedings in the action appealed from*. . . .

(Emphasis added).

In the present case, the Oygards' appeal pursuant to § 8-7 was from "any other order" and stayed "all proceedings in the action appealed from." However, "proceedings" refers to legal enforcement proceedings. *State v. Magnotta*, 1 Conn. Cir. 151, 172 A.2d 515 (1961). Regardless of how the Oygards' due process claim is viewed, in the final analysis they would need to demonstrate a property interest in the enforcement of a zoning regulation against an abutting landowner, and the Court of Appeals did not depart from the usual course of judicial proceedings by approving the District Court decision which held that no such property interest exists. *See Gagliardi v. Village of Pawling*, 18 F.3d 188, 192 (2d Cir. 1994) (plaintiffs have no constitutional right to demand that municipal officials enforce zoning laws). *Ellentuck v. Klein*, 570 F.2d 414, 430 (2d Cir. 1978) (claimed that zoning permit was improperly issued and that conspiracy existed in favor of developer at expense of neighborhood is not cognizable under § 1983).

III.

THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH OTHER DECISIONS.

A Writ of Certiorari should not be granted on the basis that the decision by the Court of Appeals on the Oygards' appeal is in conflict with other decisions. The Court of Appeals followed a uniform body of case law in affirming the District Court's finding that the Oygards failed to demonstrate a constitutionally protected property interest.

To state a substantive due process claim a party must first establish that he had a valid property interest in a benefit that was entitled to constitutional protection at the time he

was deprived of that benefit. *Zahra v. Town of Southold*, 48 F.3d 674, 680 (2d Cir. 1995); *Brady v. Town of Colchester*, 863 F.2d 205, 211-12 (2d Cir. 1988) (citing *Board of Regents v. Roth*, 408 U.S. 564, 576-77, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). The Second Circuit uses a strict "entitlement" test to determine whether a party's interest in land-use regulation is protectable under the Fourteenth Amendment. *Gagliardi v. Village of Pawling*, 18 F.3d 188, 192 (2d Cir. 1994); *RRI Realty Corp. v. Incorporated Village of South Hampton*, 870 F.2d 911, 918 (2d Cir. 1989); *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 58-59 (2d Cir. 1985). In addition to demonstrating strict "entitlement" the party must further demonstrate that the defendant acted in an arbitrary or irrational manner in depriving him of the protected property interest, in order to show a deprivation of substantive due process. *See Crowley v. Courville*, 76 F.3d 47, 52 (2d Cir. 1996); *Frooks v. Town of Cortlandt*, __ F. Supp. __, 1998 WL 113099, *6 (S.D.N.Y. March 11, 1998).

Substantive due process protects against government action that is arbitrary, conscience shocking or oppressive in a constitutional sense, but not against a government action that is merely "incorrect or ill advised." *Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995) (quoting *Lowrance v. Achtyl*, 20 F.3d 529, 538 (2d Cir. 1994). When considering a due process claim the federal courts are mindful of the general proscription that they "should not become zoning boards of appeal to review non-constitutional land use determinations by . . . local legislative and administrative agencies." *Zahra v. Town of Southold*, 48 F.3d 674, 679-80 (2d Cir. 1995) (quoting *Sullivan v. Town of Salem*, 805 F.2d 81, 82 (2d Cir. 1986). To state a substantive due process claim, the complainant must first demonstrate a "legitimate claim of entitlement" to the benefits in question. *Crowley v. Courville*, 76 F.3d 47, 52 (2d Cir. 1996).

> The focus of the analysis is on the nature of the applicant's interest . . . specifically whether the applicant has a clear entitlement to the approval sought by the government official or administrative body.

Walz v. Town of Smithtown, 46 F.3d 162, 167-68 (2d Cir. 1995). The key to determining the existence of such property interest is the extent to which the deciding authority may exercise discretion in reaching its decision, rather than an estimate of the likelihood of a particular result. *RRI Realty Corp. v. Incorporated Village of South Hampton*, 870 F.2d 911, 918 (2d Cir. 1989). If there exists an adequate property interest, then the plaintiff must show that the defendant acted in an arbitrary or irrational manner to deprive him or her of that interest. *Crowley*, 76 F.3d at 84-85.

The Oygards do not allege the deprivation of a federally protected right. Although the amended complaint alleges violations of due process without much elaboration, the plaintiffs' due process claim is based on the contention that the defendants conspired to deprive the plaintiffs of rights secured by state zoning statutes and town zoning regulations. Nothing in the plaintiffs' Amended Complaint indicates the plaintiffs have been deprived of a specific property right. Clearly, the plaintiffs do not have any entitlement to uses of neighboring property on the ground that those uses may affect the market value of their property. *Mehta v. Surles*, 905 F.2d 594, 598 (2d Cir. 1990); *Fusco v. State of Connecticut*, 815 F.2d 201, 206 (2d Cir. 1987). Nor do the plaintiffs have a constitutional right to demand that municipal officials enforce zoning laws. *Gagliardi v. Village of Pawling*, 18 F.3d 188, 192 (2d Cir. 1994). For instance, the mere existence of state procedures for rectifying erroneous or obsolete violations

does not give rise to an independent property interest protected by the Fourteenth Amendment. *See Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 58-59 (2d Cir. 1985). In addition, in *Zahra v. Town of Southold*, 48 F.3d 674 (2d Cir. 1995), the court held:

> The mere existence of procedures for obtaining a permit or certificate do not, in and of themselves, create constitutional property interests. We expressly decline to announce a rule that would obligate federal courts to consider endless numbers of alleged property interests arising not from the benefits themselves but as extensions of existing or sought property interests.

Id. at 682.

It is axiomatic that before procedural due process can be considered to have been denied, a constitutionally protected property interest must exist and be identified. *See Numanchi v. Board of Trustees of Conn. State Univ.*, 850 F.2d 70 (2d Cir. 1988), citing *Matthews v. Eldridge*, 424 U.S. 319 (1976). For the reasons set forth above the Oygards have no constitutionally protected property interest to which the procedural due process requirement would apply. That said, the municipal defendants note that the plaintiffs took full advantage of their opportunity to be heard, *cf. Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1984), at the zoning board level, at the trial court level, and the Connecticut Appellate and Supreme Court levels. Not only did the plaintiffs take full advantage of their opportunity to be heard, but they succeeded when they did so. There can be no violation of procedural due process under these circumstances.

It is well settled that the constitutional guarantee of equal protection is intended to keep "governmental decision makers from treating differently persons who are in all relevant aspects alike." *Nicholas v. Tucker*, 114 F.3d 17, 20 (2d Cir. 1997). The Oygards' equal protection claim does not challenge the state zoning statutes themselves, but rather the purported "selective enforcement" of the zoning statutes. It has been held that selective enforcement is a "murky corner of equal protection law in which there are surprisingly few cases." *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980), *cert. denied*, 450 U.S. 959, 101 S. Ct. 1418, 67 L. Ed. 2d 383 (1981). Nevertheless, this Court has ruled that such a claim is proper when it is established that: (1) The person, compared with others similarly situated, was selectively treated; and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations such as race or religion, to punish or inhibit the exercise of constitutional rights, or by malicious or bad faith intent to injure the person. *Zahra v. Town of Southold*, 48 F.3d 674, 683; *FSK Drug Corp. v. Perales*, 960 F.2d 6, 10 (2d Cir. 1992); *see LaTireste Restaurant and Cabaret, Inc. v. Village of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994); *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1352 (2d Cir. 1994).

In granting summary judgment in favor of the municipal defendants on the equal protection claim the District Court correctly noted that the plaintiffs failed to produce any evidence that other similarly situated landowners were treated differently than were they. The complaint is devoid of any allegation that the municipal defendants would have enforced the zoning regulations at the request of another resident whose situation was similar to the Oygards. In the absence of such factual assertions, the plaintiffs' equal protection claim is insufficient as a matter of law. *See Gagliardi v. Village of*

Pawling, 18 F.3d 188, 193 (2d Cir. 1994). Furthermore, the complaint does not allege a malicious or bad faith intent to injure the Oygards, nor is there any issue of material fact that the municipal defendants had no such intention. Even if one were to assume all of the Oygards' allegations to be true, the municipal defendants' intentions would have been to work with Koepke to secure advantageous radio communications service, but could never be construed to be an intention to harm the Oygards.

Nor is the Court of Appeals' ruling on the plaintiff's RICO claim in conflict with other decisions. In *Oscar v. University Students Co-op Association*, 965 F.2d 783 (9th Cir. 1992), *cert. denied*, 506 U.S. 1020 (1992), plaintiff rented an apartment near a student co-op building. Because of illegal activities at the co-op, plaintiff filed a RICO claim and alleged that she had lost use and enjoyment of her rental interest and the value of such interest had declined. In upholding a dismissal of the claim the Ninth Circuit found the plaintiff failed to allege an injury to business or property cognizable under RICO. The court emphasized that while RICO was generally to be liberally construed, the requirement that the plaintiffs allege and prove that they were "injured in their business or property" is a significant limitation on their right to recover. 965 F.2d at 785-86 (noting that the Supreme Court characterized this language as being of restrictive significance, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). A showing of injury requires "proof of concrete financial loss." *Oscar*, 965 F.2d at 785. The *Oscar* court then found the plaintiff's pleading insufficient to survive a motion to dismiss:

> Oscar does not allege any financial loss which would be compensable under RICO . . . the only

> injury she has alleged is a "decrease in the value of property" due to the racketeering activity next door. We do not believe such a decrease entails financial loss to Oscar.

Id. at 786. The *Oscar* court then noted that there was no allegation that Oscar had ever attempted to sublet the apartment or even that she ever wished to intend or intended to sublet it. Thus, "any supposed loss is therefore purely speculative." *Id.* at 787.

The facts and holding in *Oscar* relate directly to the Oygards' circumstances. The Ninth Circuit implied that just as there was no reason to believe that plaintiff Oscar ever attempted to sublet her apartment, there is equally no evidence that the Oygards intended to develop or subdivide the property. Simply being adjacent to an alleged racketeering activity is not a "proof of concrete financial loss" required in a RICO action. The Oygards' RICO Case Statement simply indicates that "according to a certified appraiser nearly 100% of potential buyers of plaintiffs' property would not want to defendant Koepke's radio tower from their residence." This statement does not rise to an allegation that plaintiffs have suffered a concrete financial loss. *See Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 24 (2d Cir. 1990) (injury of lost business commissions is "too speculative to confer standing, because Hecht only alleges that he would have lost commissions in the future, and not that he has lost any yet"); *Bankers Trust v. Rhoades*, 859 F.2d 1096, 1104 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989) (civil RICO damages "are unrecoverable if the facts of their accrual are speculative or their amount and nature unprovable"); *In re Taxable Municipal Bond Securities Litigation*, 51 F.3d 518 (5th Cir. 1995) (mere allegation of "lost opportunity" to

secure a loan too speculative to constitute RICO injury); *Steele v. Hospital Corporation of America*, 36 F.3d 69 (9th Cir. 1994) (speculative injuries do not serve to confer standing under RICO unless they become concrete and actual); *Three Crown Ltd. Partnership v. Salmon Brothers, Inc.*, 906 F. Supp. 876 (S.D.N.Y. 1995) (damages based on investments not made or lost future profits are speculative); *First Nationwide Bank v. Gelt Funding Corp.*, 820 F. Supp. 89, 95-96 (S.D.N.Y. 1993), *aff'd*, 27 F.3d 763 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 728 (1995) ("plaintiff cannot survive a motion to dismiss by alleging novel and speculative compensatory damages that may or may not arise").

CONCLUSION

Respondents respectfully request the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

THOMAS R. GERARDE
Counsel of Record
HOWD & LUDORF
Attorneys for Respondents Town of Coventry, Coventry Town Council, Joan Lewis, John Elsesser and Richard Ashley
65 Wethersfield Avenue
Hartford, Connecticut 06114-1190
(860) 249-1361

APPENDIX

APPENDIX A — AFFIDAVIT OF ALAN J. KOEPKE

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL ACTION

NO. 3:95CV02486 (DJS)

MARCH 31, 1997

SUSAN C. OYGARD
NORVALD OYGARD,

Plaintiffs,

v.

TOWN OF COVENTRY, COVENTRY TOWN COUNCIL, JOHN ELSESSER, JOAN LEWIS, ALAN J. KOEPKE and RICHARD A. ASHLEY,

Defendants.

AFFIDAVIT OF ALAN J. KOEPKE

I, Alan J. Koepke, hereby state the following:

1. I am over the age of 18 years and believe in the obligation of an oath.

2. I am in the business of providing communication equipment and related services to amateur and commercial users and have done business under the name of Communications & Electronics since 1968.

Appendix A

3. In conjunction with my business, I have owned or operated several radio towers in Connecticut. These towers are used by both public and private entities.

4. During the time that I have been in business, I have provided free use of tower facilities to the following towns:

TOWNS	TOWER LOCATION	SERVICE COMMENCED
Colchester, Salem, Hebron, East Hampton Marlborough	Colchester	1976
Danielson, Ashford	Coventry	1993
Tolland	Storrs/Coventry	1984/1990
Willimantic	Storrs/Coventry	1984/1990
Coventry	Storrs/Lebanon/ Coventry	1986/1986/1990

These towns provide services such as police, fire, ambulance and 911 emergency response, among other things, which I believe are beneficial to the community.

5. In July, 1986, I received a zoning permit to construct a radio antenna on North School Road in Coventry. Once the permit was issued, I exercised an option to purchase a one-third acre parcel of land on North School Road to build the

tower and a small building to house the telecommunications equipment.

6. In mid-August, 1986, Susan Oygard appealed the issuance of a zoning permit which led to nearly ten years of litigation, including two decisions each by the Connecticut Appellate Court and the Connecticut Supreme Court. I also instituted a separate civil lawsuit seeking damages against the zoning enforcement officer of the Town of Coventry.

7. In June, 1995, after the Coventry Zoning Board of Appeals, upon remand of the matter, voted to sustain Susan Oygard's appeal of the issuance of a zoning permit, I entered into a settlement agreement with the Town of Coventry to dismantle and relocate the radio tower to a site behind Coventry Town Hall. The tower was dismantled on August 6, 1996. The relocation project was completed in October, 1996.

8. I had no knowledge, until after the Oygard's complaint was filed, that the Oygards and the Town of Coventry entered into an agreement whereby the Town agreed to take enforcement action against the North School Road tower. I attended a meeting with Mrs. Oygard, town officials and other persons on March 12, 1990 to discuss the possibility of relocating the tower to the O'Connor's property on North School Road. I do not recall the subject of an agreement between the Oygards and the Town being discussed at that meeting. The first time I saw the Resolution referred to in the Amended Complaint, Second Count, ¶64, was after the Oygards' complaint was filed.

Appendix A

9. At no time from June, 1986 through August, 1996 did I ever have an agreement with any Coventry town official to provide free tower space on the North School Road tower in exchange for the town's promise not to enforce its zoning regulations against me. The free space which I provided to the Town of Coventry was no different than that which I provided to other municipalities at North School Road and other locations. The Town of Coventry paid for the telecommunications equipment and radio services which it used at my tower and electric and telephone charges associated with its use at the tower.

s/ Alan J. Koepke
Alan J. Koepke

STATE OF CONNECTICUT)
: ss. March 25, 1997
COUNTY OF TOLLAND)

Personally Appeared Alan J. Koepke Signer of the foregoing Instrument, and acknowledged the same to be his free act and deed, before me.

s/ [illegible]
Commissioner of the Superior Court

Supreme Court, U.S.
FILED
MAR 25 1999
CLERK

(4)

No. 98-1327

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

SUSAN OYGARD and NORVALD OYGARD,
Petitioners,

v.

TOWN OF COVENTRY, COVENTRY TOWN COUNCIL,
JOAN LEWIS, JOHN ELSESSER,
RICHARD ASHLEY, ALAN KOEPKE
Respondents

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the Second Circuit

REPLY
TO RESPONDENTS' BRIEFS IN OPPOSITION

Susan Oygard, *pro se*
Norvald Oygard, *pro se*
235 North School Road
P.O. Box 62
Coventry, CT 06238
860-742-5209

8 pp

Petitioners reply to the following points raised by respondents in their briefs:

1. Municipal respondents brief in opposition pg. 3:

> *The lack of clarity stems from the facts that the District Court's Order granting summary judgment could arguably have extended to the defendant's counterclaim..*

The lack of clarity is precisely the problem. It is not inconceivable that municipal respondents will argue during remand proceedings in state court, as they did in their Appellate Court brief,[1] that the District Court's Order granting summary judgment extended to the counterclaim.

Petitioners have more than an idle interest in knowing whether or not summary judgment has been entered against them on the counterclaim. Leaving the matter unresolved by declaring it unclear is a departure from the accepted and usual course of judicial proceedings.

2. Municipal respondents' brief in opposition pg. 4:

> *There is little question, however that the District Court focused on the plaintiffs' amended complaint dated October 30, 1996.*

No one reading the District Court's recitation of facts in its ruling (Oygard App. pgs 2-3) would have any idea that the Town was involved in Koepke's illegal activities in any way. Every detail that points to state action is inexplicably

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[1]See municipal defendants' brief in *Oygard v. Town of Coventry* No. 98-7578, pgs 34-36.

left out of the District Court's ruling. Due process under Conn. Gen. Stats. § 8-7 and § 8-8 is not addressed.

The fact that *both* of the lower court opinions are unpublished should be a red flag to this Court. Chief Judge Posner of the Court of Appeals for the Seventh Circuit was recently quoted on the front page of the New York Times as saying that the tendency of federal appellate courts to issue unpublished opinions "is sort of a formula for irresponsibility.... Most judges, myself included, are not nearly as careful in dealing with unpublished decisions."[2]

3. Municipal respondents brief in opposition pg. 8:

> *Not only did the plaintiffs' take full advantage of their opportunity to be heard, but they succeeded when they did so.*

Petitioners' succeeded only in the sense that the Walzes succeeded in obtaining a permit to connect to the public water service in *Walz v. Town of Smithtown* 46 F.3d 162 (2d Cir.1995), cited by municipal respondents in their brief on page 7.

The Walzes lived on a narrow unpaved road in Smithtown, N.Y. When their well went dry, they applied to the local Highway Department for a permit to connect to the public water service. The Superintendent of Highways, refused to issue the permit unless the Walzes conveyed a fifteen foot wide strip of land to the Town so that the Town could improve the road. The Walzes refused to give up their land to obtain water services. Litigation ensued which resulted in a court order to the Superintendent of Highways to issue a permit. A permit was then issued but with several

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[2]See Sunday March 14, 1999 New York Times, page 1 'Caseload Forces Two-Level System for Appeals Courts'

unusual conditions attached. The Walzes thereupon filed a motion to hold the Superintendent of Highways in contempt. Only then, after they filed a motion for contempt, did the Walzes succeed in obtaining a permit for the standard fee.

Likewise, petitioners 'succeeded' in their zoning appeal only after the municipal respondents were personally served with the summons and complaint in the case at bar. The Coventry Town Council, like the Yonkers City Council in *Spallone v. U.S.* 487 U.S.1251 (1988), acted as if legal proceedings were irrelevant, until its members found themselves personally involved in the litigation.

4. Municipal respondents brief in opposition pg. 5:

> *In the present case, the Oygards' appeal pursuant to § 8-7 was from "any other order" and stayed "all proceedings in the action appealed from." However, "proceedings" refers to legal enforcement proceedings. State v. Magnotta, 1 Conn. Cir. 151, 172 A.2d 515 (1961)*

State v. Magnota, a 1961 Connecticut superior court decision, was overruled by the Connecticut legislature in 1977 with the passage of Public Act 77-509, which amended the 'stay' language of the statute to its present form. Senate Bill 597, which was enacted as P.A. 77-509 § 6, was entitled AN ACT CONCERNING THE STAYING OF CONSTRUCTION PENDING A ZONING APPEAL. See discussion in Plaintiffs' motion for summary judgment, Oygard App. pgs 83-86.

5. Municipal respondents brief in opposition pg. 10:

> *Even if one were to assume all of the Oygards' allegations to be true, the municipal defendants' intentions would have been to work with Koepke to*

secure advantageous radio communications service, but could never be construed to be an intention to harm the Oygards.

Municipal respondents confuse motive with intent. Like the Superintendent of Highways in *Walz v. Town of Smithtown, supra* whose motive, in all likelihood, was to improve a town road and not to harm the Walzes, municipal respondents are not absolved of liability by claiming that their motive was to secure advantageous radio communications service.

6. Municipal respondents brief in opposition pg. 9:

The Oygards' equal protection claim ... [challenges] ... the purported "selective enforcement" of the zoning statutes.

The Oygards' equal protection claim is that they were denied equal protection when the respondents conspired to violate Conn. Gen. Stats. § 8-7 and § 8-8 and the Coventry Zoning Regulations. All co-conspirators are jointly and severally liable for the acts of each of the conspirators in furtherance of the conspiracy. See 16 Am. Jur.2d § 16:

> Each act done in pursuance of the conspiracy by one of several conspirators is, in contemplation of law, an act for which each is jointly and severally liable. This joint and several liability of a conspirator applies to damages accruing prior to his joining the conspiracy, as well as damages thereafter resulting, and regardless of whether he took a prominent or inconspicuous part in the execution of the conspiracy. This liability of each member of a conspiracy for the damage resulting therefrom exists whether or not the conspirator profited from the result of the conspiracy.

7. Municipal respondents brief in opposition pg. 2:

> *The respondents specifically deny petitioners' statement on page 6 of the petition that co-defendant Koepke constructed his radio tower 'with the cooperation of the Coventry Building Inspector.'*

The record supports petitioners' statement. See Koepke Deposition pg. 14 (Plaintiffs' Motion for Summary Judgment Exhibit 1):

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Q. Isn't it true that on August 19th of 1986, you received a certified letter dated August 18th, 1986, from Zoning Agent Robert Isner stating that an appeal of his decision to issue a zoning permit for a radio tower had been filed on August 12th of 1986?

A. To the best of my recollection, I did receive a letter.

Q. Isn't it true that the August 18th, 1986 letter from Robert Isner advised you that a public hearing would be held on September 16th, 1986?

A. I believe it did.

Q. After you received notice that an appeal had been filed, did any local government official encourage you to go forward with construction?

[question repeated]

A. Yes.

Q. And who was that?

A. Mr. Broderson and Mr. Willnauer.

Q. And do you know what Mr. Willnauer's position was within the government?

A. Well, to my recollection, at that time he was the Sanitarian, the Building Official, and Assistant Zoning Agent.

***

There is other evidence in the record as well. See Koepke Deposition, deposition exhibit 5 ¶25: "On August 21, 1986, Koepke called the Coventry Building Department for permission to pour concrete for the proposed building. This permission was granted by Al Broderson [assistant building inspector]."; and deposition exhibit 12 ¶ 24: "On or about September 9, 1986, Alan Broderson, the building official, conducted the final electrical inspection for the connection of the public utilities to the building."

Municipal respondents produced no rebuttle evidence whatsoever. Until now, they did not even deny that Koepke constructed his tower with the cooperation of the Coventry building inspector.

8. Respondent Koepke's brief in opposition pg. 3:

> *In fact, Koepke provided free antenna space to all of the ten municipalities which utilized his four towers in eastern Connecticut.*

First of all, Koepke's customary business practices do not preempt state regulatory statutes governing zoning appeals. Second, even if true, Koepke's activities in other towns is irrelevant. There is nothing in petitioners' complaint about any town other than Coventry. If he is, or was, doing in other towns what he did in Coventry, that is all the more reason to grant the petition for certiorari because it reinforces petitioners' argument that the issues raised in this case have implications beyond the Town of Coventry.

9. Respondent Koepke's brief in opposition pg. 6:

> *These are issues not raised by the Oygards in either their amended complaint or their summary*

> *judgment motion. Thus, such claims cannot be raised for the first time before this Court.*

Each of the questions presented for review before this Court was presented to the Court of Appeals. See petitioners' Appellate Court brief, Oygard App. pgs. 119 et seq.

Moreover, the arguments raised in support of the petition for writ of certiorari were also raised in the courts below. See e.g. Plaintiffs objection to municipal defendants' Rule 12(b)(6) motion, pg. 15: "Bribe receiving is a felony that qualifies as a fundamental procedural irregularity giving rise to a substantive due process claim." See also Plaintiffs' Appellate Court reply brief pg. 8: "Obstructing justice by undermining the defense of the Zoning Board of Appeals during the course of a nine year administrative appeals process is a substantive due process violation." See also plaintiffs' equal protection argument in their motion for summary judgment citing Justice Brennen's concurring opinion in Heckler v. Chaney: (Oygard App. pg. 92)

> [T]he Court properly does not decide today that nonenforcement decisions are unreviewable in cases where ... [such decisions are] made for entirely illegitimate reasons, for example, nonenforcement in return for a bribe, judicial review of which would not be forclosed by the nonreviewability presumption.

CONCLUSION

Certiorari should be granted.

Susan Oygard, *pro se*
Norvald Oygard, *pro se*
235 North School Road
P.O. Box 62
Coventry, CT 06238
(860) 742-5209